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In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *Weinberger v. Wiesenfelder*, 420 U.S. 636 (1975), teaches that when the government's true reason for treating citizens unequally is known, courts should not accept post hoc justifications that were not the goal of the challenged legislation. In light of *Weinberger*, may the state of Maine justify the unequal treatment of religion in a high school education program on grounds that plainly were not an actual goal of legislators who enacted the program?

2. Until 1980, Maine had a long history of including religious options in its high school "tuitioning" program and there is nothing in the state constitution that even arguably requires the exclusion of religious options from that program. Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious options entirely from an otherwise neutral educational aid program based solely on a misinterpretation of the Federal Establishment Clause?

LIST OF PARTIES

The parties to the proceeding below were petitioners Kevin and Julia Anderson, Dale and Bethany Daniels, Lionel and Jill Guay III, Stephen and Sharon Jerome, Christine Koza, Lawrence and Kathryn Rugan, Michael and Jennifer VanDerWerf, Michael and Jerilyn Ward; and respondents Durham School Department, Superintendent Shannon Welsh, Minot School Department, Superintendent Robert Wall, Raymond School Department, Superintendent Sandra Caldwell, Maine Department of Education, Commissioner Susan Gendron; and intervenor-respondents Maine Civil Liberties Union, David Currier, Timothy Fitzgerald, Lois Kilby-Chesley, Tim and Joan Morin, Howard Reben, W W Reily, Ken and Barbara Williams.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court Sitting As The Law Court, entered in the above-entitled proceeding on April 26, 2006.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court Sitting As The Law Court has been reported at 895 A.2d 944 and is reprinted in the appendix hereto, p.1, *infra.*

The opinion of the Cumberland County Superior Court has been reported at 2004 Me. Super. LEXIS 206 and is reprinted in App. 41, *infra.*

JURISDICTION

The judgment of the Maine Supreme Judicial Court Sitting As The Law Court was entered on April 26, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The texts of 20-A M.R.S.A. §§ 2951 and 5204(4) are reproduced in App. 64-65, *infra.*

STATEMENT OF THE CASE

A. Statement of Facts

During the height of the anti-Catholic Know Nothing hysteria in 1854, the Maine Supreme Court upheld the Ellsworth School Committee's expulsion of fifteen year-old Roman Catholic Amanda Donahoe for refusing to read from the Protestant King James Bible.[1] Amanda regarded it as sinful to do so, on the advice of her priest, Father John Bapst. Noting that "[l]arge masses of foreign population are among us, weak in the midst of our strength," the Court held that her religious scruples could not justify her refusal.[2]

Father Bapst began teaching Amanda and several other expelled Catholic children in a chapel in Ellsworth that was used on Sundays for religious services, until a mob of Ellsworth Know Nothings burned down the chapel, tarred and feathered Father Bapst, rode him out of town

[1] *Donahoe v. Richards*, 38 Me. 379 (1854).

[2] *Donahoe*, 38 Me. at 413. Maine continued to require Bible reading in its public schools until this Court held in 1963 that the practice violated the Establishment Clause in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). See also Ernst Helmreich, *Religion and the Maine Schools: An Historical Approach* (1960).

on a rail, and threatened to burn him at the stake.[3] For his safety, the Catholic authorities moved him north to Bangor, Maine. John Bapst Catholic High School in Bangor, one of Maine's four Catholic high schools in 1980, was named in memory of Father Bapst and his steadfastness in the face of Protestant persecution.

In 1980, John Bapst Catholic High School was forced to close, after Maine's Attorney General advised its principal that a legal opinion that he was about to issue concluded that religious schools could no longer receive tuition payments from towns that did not maintain their own public high school. These towns tuitioned their students to whatever public or private high school the students' families selected.[4] Despite religious high schools having participated in this tuitioning system from its inception in 1879, when all or virtually all of the private schools in Maine were religious (albeit overwhelmingly Protestant),[5] the Attorney General concluded that such participation violated the Federal Establishment Clause and that the existing statute had to be construed to exclude the choice of religious schools.[6] Although by 1980

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[3] Nor was the Ellsworth attack an isolated incident: the Old South Church in Bath, Maine, which was rented for Catholic religious services, was burned to the ground by another Know Nothing mob the same year. William David Barry, *Fires of Bigotry*, Down East Magazine (Oct. 1989).

[4] Plaintiffs' Statement of Material Facts ¶¶ 2, 3, Tab 6 in Appendix to Petitioner's Brief below (hereinafter "App. Below").

[5] Maine districts have paid tuition for their resident students to attend private elementary schools for over 200 years, Ava Harriet Chadbourne, *History of Education in Maine* 31-39 (1936), a practice extended to secondary schooling in 1879, at which time most of the private academies were religious, *id.* at 281-84; William Stetson, *A Study of the History of Education in Maine* 86 (1902).

[6] Op. Me. Att'y Gen. 80-2 (1980), App. 68.

only a very small number of students attended religious schools on such tuition payments, a substantial proportion of the students at John Bapst Catholic High School did so.[7]

The Attorney General's Opinion (hereinafter "AG Opinion") was legally flawed. It failed to treat separately two very different types of tuition payments made by districts that did not maintain their own high schools. Such districts could either contract with a private school for schooling privileges for all its resident high school students or allow families to choose the private or public school of their choice. Under the first or "contract" option, students are compelled to attend the private school, and the Attorney General quite properly found it would violate the Establishment Clause to force students to attend a religious school. But he failed to analyze separately the statutory provision allowing parents to choose their children's school and receive what amounts to a scholarship from their district, which presents a markedly different constitutional context. The Attorney General lumped together the two distinct programs in his analysis.[8]

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[7] In 1979-80, 124 of John Bapst's 308 students were attending on tuition from their towns, out of a total of 211 students tuitioned statewide to sectarian schools. The 211 students constituted a mere 1.1-1.2% of students tuitioned at that time. Joint Stipulation of Facts ¶¶ 15, 16, Tab 5 in App. Below.

[8] Among the cases the AG relied on for his analysis was *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), but he failed to notice that in that decision this Court *expressly reserved judgment* on the question of "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 782 n.38. This Court specifically distinguished *Nyquist* in *Zelman v. Simmons-Harris* on the basis of that note. 536 U.S. 639, 661-62 (2002).

The Maine Department of Education implemented the AG Opinion for the 1980-81 school year.[9] The Attorney General had prepared his Opinion for Senator Howard Trotsky, chairman of the Maine Legislature's Joint Education Committee, which was preparing a complete revision of Maine's education laws. This revision, passed in 1982 and made effective in 1983, incorporated the Opinion's conclusion by modifying the tuitioning statute to specifically exclude any school that was not a "nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2).[10]

Besides forcing John Bapst Catholic High School to close, the implementation of the Opinion by the Education Department and its incorporation into the Maine statutes denied tuition payments to students attending several other religious schools that formerly received them. These included Cheverus High School and St. Dominic's High School, Catholic schools, and Pine Tree Academy, a Seventh Day Adventist school. In 1997, families in the tuitioning town of Raymond, Maine with high school students attending Cheverus High School filed a lawsuit in state court challenging the constitutionality of their school district's denial of tuition payments.

The plaintiffs argued that the 1980 AG Opinion misinterpreted the Establishment Clause and that incorporating its erroneous conclusion into the tuitioning law failed both strict scrutiny and rational basis review under the Equal Protection Clause. The Maine Supreme Court in

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[9] Affidavit of James Watkins, Jr. ¶ 29, Joint Exhibit 5 to the Joint Stipulation of Facts, Tab 5 of App. Below.

[10] A copy is attached at App. 64.

Bagley v. Raymond Sch. Dep't, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999), while acknowledging that an erroneous interpretation of the Establishment Clause could not supply a rational basis for religious discrimination, rejected the idea that the Attorney General had misinterpreted the Establishment Clause. The Court held that even though the tuition payments were directed by the free and independent choices of the parents they nonetheless had a primary effect of advancing religion under *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and that compliance with the Establishment Clause was a compelling basis for discriminating against parents selecting religious schools.

Three years after denying certiorari in *Bagley*, this Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* laid to rest the idea that it violates the Establishment Clause to allow parents a free and independent choice of schools under a religiously-neutral school choice program, even where a large majority of families choose religious schools. After the Maine Attorney General issued a cursory letter to the Maine Commissioner of Education directing him to continue applying § 2951(2)'s exclusion of religious schools after *Zelman*,[11] parents in three tuitioning towns (Raymond, Durham, and Minot) with children attending St. Dominic's High School and Pine Tree Academy filed suit in state court seeking to have § 2951(2) overturned on the basis of *Zelman*.

[11] This letter is attached at App. 66.

B. Proceedings Below

After holding that the districts' actions denying tuition payments on behalf of petitioners' children pursuant to § 2951(2) was not action taken under color of state law under 42 U.S.C. § 1983 and dismissing the districts from the suit,[12] the trial court held that the state defendants had not violated the Free Exercise, Establishment, or Equal Protection Clauses of the Federal Constitution.[13] Recognizing that the trial court had to follow the Maine Supreme Court's erroneous resolution of the similar Free Exercise and Establishment claims in *Bagley*,[14] petitioners focused primarily on their Equal Protection claim that § 2951(2) did not satisfy rational basis review, let alone the compelling interest test normally applied to non-neutral religious classifications. The trial court rejected that claim, finding it irrelevant that § 2951 was based on a misunderstanding of the Establishment Clause because the state had asserted new rationales, including that § 2951 promoted the compelling state interest of religious diversity in public schools. These new rationales were put forward by individual state legislators opposed to legislation designed to repeal § 2951(2) that was introduced after

[12] The *Anderson* court declined to rule on the appeal of this issue deeming it a moot point. 895 A.2d at 950 n.5.

[13] Petitioners dropped a claim under the Free Speech Clause after this Court rejected a Free Speech claim in *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004).

[14] Petitioners preserved these claims and subsequently argued them to the Maine Supreme Court, seeking to have it overrule its prior resolution of them in *Bagley*. The Court declined to do so on the merits and consideration of the Free Exercise and Establishment claims would be properly before this Court on certiorari.

this lawsuit was filed in 2002.[15] The legislation failed, but the trial court used the diversity rationale given by some of the legislators rather than evaluating the actual reason § 2951(2) was adopted in 1982 – namely, to comply with the state's mistaken understanding of the Federal Establishment Clause.[16]

On appeal, the Maine Supreme Court affirmed by a 6-1 vote. The Court began its analysis by rejecting petitioners' argument that the 1980 AG Opinion was poorly reasoned, concluding that the Attorney General "gave good advice" and that the Maine Legislature "acted prudently and responsibly in taking that advice and enacting section 2951(2)." The court also stated that the Attorney General and Legislature were motivated by a desire to respect and comply with the Establishment Clause, rather than any religious animus.[17]

Relying upon this Court's rejection in *Locke* of the idea that a statute is presumptively unconstitutional when it is not neutral with respect to religion, *Anderson* rejected petitioners' Free Exercise and Establishment Clause

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[15] *Anderson* mistakenly states this lawsuit arose after the legislation was defeated. 895 A.2d at 949.

[16] Petitioners objected to the consideration of these rationales as incapable of justifying a statute passed more than 20 years before for another reason. Petitioners also noted that the state failed to mention a number of other rationales given by legislators in 2003 that were less "noble" than diversity, such as the cost savings the state derived from the religious discrimination, a continued belief that the Establishment Clause required the discrimination, and a fear that religious neutrality might allow unpalatable religions to open schools. Transcript of House Debate on LD 182 (May 13, 2003), in App. Below at 169-178 (comments of Reps. Cummings, Mills, Davis and Gagne-Friel).

[17] *Anderson*, 895 A.2d at 958.

claims. It held that § 2951(2) does not substantially burden a religious practice,[18] merely prohibiting the state from funding parents' school choice without "burden[ing] or inhibiting religion in a constitutionally significant manner." 895 A.2d at 959. *Anderson* concluded that "*Locke* recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause." *Id.* at 954.

Anderson then applied the rational basis test to reject petitioners' Equal Protection claim, relying on *Locke* and the First Circuit's decision in *Eulitt v. Maine Department of Education*, 386 F.3d 344 (2004).[19] It characterized that

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[18] Although the Maine Court recognized that several of the petitioners had religious motivations for sending their children to religious schools, it found that since their religions did not *mandate* that they do so, their religious practices were not substantially burdened. Most of the petitioners are Catholics, and while Catholic doctrine states that Catholics should send their children to Catholic schools like St. Dominic's, it recognizes this is sometimes impossible and does not make it an inflexible requirement. See *Gravissimum Educationis* in *Documents of Vatican II* 637 (Walter M. Abbot, S.J. ed. 1965) ("Catholic parents are reminded of their duty to send their children to Catholic schools wherever this is possible"). The substantial burden requirement is inconsistent with this Court's decisions in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 872 (1990), as well as *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170-71 (3rd Cir. 2002); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-67 (3rd Cir. 1999); *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995); and *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3rd Cir. 1994). Both the D.C. and Third Circuits have rejected any requirement that a religious practice must be mandatory before it can be protected. *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002), and *Tenafly*, 309 F.3d at 171.

[19] *Eulitt* was a parallel lawsuit filed in federal court challenging the constitutionality of § 2951(2).

test as "requir[ing] only that a fairly conceivable set of facts establish a legitimate government interest that would support the challenged classification" and noted that the state had offered several conceivable justifications: avoiding excessive entanglement between religion and state, concerns about maintaining religious diversity in the public schools, and avoiding involvement in discrimination in admissions and hiring by religious schools.[20] The Court rejected petitioners' argument that *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), barred the state from offering additional rationales for the statute when the actual rationale is known. The Court found the state's newly proffered reasons to be "not inconsistent with or contradictory to prior stated goals," and in particular found a concern with excessive entanglement to be both an original justification for the AG Opinion and a conceivable justification even after *Zelman*'s vindication of school vouchers.[21]

REASONS FOR GRANTING THE WRIT

I. STATE AND FEDERAL COURTS ARE DIVIDED ON WHETHER THE RATIONAL BASIS TEST PERMITS CONSIDERATION OF CONCEIVABLE RATIONALES WHEN THE ACTUAL PURPOSE OF CHALLENGED LEGISLATION IS KNOWN.

Weinberger teaches that when the government's true reason for treating citizens unequally is known, courts should not accept *post hoc* justifications that were not the

[20] 895 A.2d at 960.

[21] *Id.*

goal of the challenged legislation. The Maine Supreme Court's treatment of the *Weinberger* decision clearly and directly conflicts with the interpretation of *Weinberger* by both the Third and Ninth Circuits. It opined that under *Weinberger* it was not "bound by the justification proffered by the State in support of the statute in *Bagley*, or offered in support of the legislation in 1981 [sic]." *Anderson*, 895 A.2d at 960. Earlier in the decision, the court rejected any implication that the Attorney General and the Legislature were motivated by religious animus, specifically finding that they "were motivated by a desire to respect and comply with the requirements of the Establishment Clause as then interpreted and applied by the United States Supreme Court." *Id.* at 958. Thus, the justification the *Anderson* court refuses to be bound by is the very justification it recognizes actually motivated the Attorney General in his Opinion and the Maine Legislature, namely, compliance with the Establishment Clause. In a very similar case involving a challenge to state action taken to comply with an erroneous understanding of the Establishment Clause, the Ninth Circuit held that *Weinberger* did *not* permit consideration of other possible justifications where the actual justification was known, *i.e.*, where the asserted purpose could not have been a goal of the policy. *Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1997). *Accord Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087, 1097 (3rd Cir. 1981).

Moreover, to the extent *Anderson* tries to avoid its failure to follow this Court's decision in *Weinberger* by asserting that a desire to avoid excessive entanglement was an original justification for the statute, the Maine

Court is being disingenuous. Excessive entanglement is, of course, an aspect of this Court's test for compliance with the Establishment Clause and was discussed in the 1980 AG's Opinion, but its discussion of excessive entanglement is as patently flawed as the Opinion's discussion of whether sending tuition payments to religious schools had a primary effect of advancing religion. The Attorney General reached the erroneous – and frankly insupportable – conclusion that the Establishment Clause would require the state to engage in a program of constant surveillance to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum.[22] In reality, no such "surveillance" is, nor ever has been, required for true school choice programs like Maine's tuitioning option, as *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zelman* make clear. To the extent the Maine Supreme Court continues to be concerned about preventing religious education from taking place in religious schools chosen by tuitioned students, its decision conflicts with *Witters* and *Zelman* and the Third Circuit's decision in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002).

Finally, this Court's decisions, such as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), rejecting erroneous Establishment Clause interpretations as justifications for discriminating against religious activities, implicitly disallow such misunderstandings from serving as legitimate justifications for classifications that, like

[22] AG Opinion at App. 91.

Maine's, discriminate against religious perspectives and organizations on their face.

A. *ANDERSON*'S APPLICATION OF THE RATIONAL BASIS TEST DIRECTLY CONFLICTS WITH THIS COURT'S APPLICATION OF THAT TEST IN *WEINBERGER V. WIESENFELD* AND WITH DECISIONS OF THE THIRD AND NINTH CIRCUITS APPLYING *WEINBERGER*.

Although it acknowledged that § 2951(2) was enacted to incorporate the Attorney General's erroneous conclusion that the Establishment Clause forbade families in tuitioning towns from choosing sectarian schools, *Anderson* nonetheless concluded that it could consider other "conceivable rationales" that the legislature could have *but did not* consider at the time. This approach to rational basis review under the Equal Protection Clause conflicts with this Court's decision in *Weinberger* and the decisions of two federal circuit courts. In those three cases, where the *actual* reason for adoption of a statute is known, other reasons that might have been *but were not considered* cannot justify the challenged classification.

In *Weinberger*, this Court stated that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." 420 U.S. 636, 648 n.16 (1975). *Anderson* interpreted the *Weinberger* "could not have been" language as permitting consideration of "conceivable" justifications the state offered 25 years after the discriminatory exclusion was effected, but which were clearly not considered by either

the Attorney General or the Education Department in implementing the exclusion of religious schools from Maine's tuitioning program in 1980,[23] or the legislature in 1982 in incorporating the exclusion into the revised education code.[24] According to *Anderson*, so long as the new justifications are "not inconsistent with or contradictory to prior stated goals" they can be considered.

This approach obviously misunderstands *Weinberger*, because in that case the government offered a justification of a classification challenged under the Equal Protection Clause that was neither inconsistent with nor contradictory to what the Court found to be the actual purpose underlying the statutory scheme. Rather, the Court found

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[23] Uncontested evidence shows that the Attorney General met with the principal of Bapst to tell him the effects of his opinion before it was issued in 1980 and that the Education Department implemented the exclusion required by the AG Opinion in the 1980-81 school year. Affidavit of Joseph Sekera, Joint Exhibit 4 to the Joint Stipulation of Facts, Tab 5 of the App. Below.

[24] The language of § 2951(2) plainly reflects the conclusion of the AG Opinion by requiring that a participating school be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." The legislative history of the enactment of the revised education code in which § 2951(2) appeared for the first time demonstrates conclusively that no substantive changes were intended by the enactment of the new code, which was held in abeyance for a year until 1983 to give the public time to find any substantive changes inadvertently included. *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs.*, 576 F. Supp. 1299, 1315 n.28 (D. Me. 1983). During the 2003 debate over possible repeal of § 2951(2), a member of the revision committee from 1982 confirmed that § 2951(2) "came about as a result of an Attorney General Opinion requested by Howard Petrosky [sic]," and "caused a change in 1981 . . . in the recodification of Title 20A," which was "done in strict concurrence with the Attorney General's recommendations" in his Opinion. App. Below at 176; Transcript of House Debate on LD 182 at H-589 (May 13, 2003) (comments of Rep. Millett).

it "apparent both from the statutory scheme and from the legislative history" that the justification offered by the government was not the actual purpose behind the statute. 420 U.S. at 642. Thus, where, as in this case, *the actual justification for a classification is known*, *Weinberger* stands for the proposition that conceivable justifications not actually considered at the time of enactment should not be accepted as potential justifications by a reviewing court. However appropriate it may be to accept conceivable hypothetical justifications when the actual reasons for a classification are unclear or unknown in order to give effect to the strong presumption of validity deriving from respect for the legislature's role in enacting legislation, *see FCC v. Beach Communications*, 508 U.S. 307, 314-15 (1993), ignoring the known actual reason behind an enactment in favor of conceivable justifications does not respect the legislature's proper role and constitutes judicial abdication of its responsibility to provide meaningful review.

In *Christian Science Reading Room, Inc. v. City of San Francisco*, the Ninth Circuit addressed a situation similar to *Anderson*. Defendants offered a mistaken interpretation of the Establishment Clause as a rational basis for a policy of excluding religious entities from renting space in a public airport. Relying on *Weinberger*, the court refused to consider two justifications the state defendants offered at trial because it found that the airport did not consider those purposes in adopting its new policy, and was instead motivated solely by a perceived need to correct an Establishment Clause violation. Since there was no Establishment Clause violation, remedying such a violation could not supply a rational basis for the religious classification. In its decision, the Ninth Circuit recognized that the two

asserted rationales it refused to consider might have been legitimate justifications, but nevertheless rejected them because the evidence made clear the actual reason for the challenged classification. *Christian Science Reading Room*, 784 F.2d at 1073.

The Ninth Circuit cited an earlier Third Circuit decision interpreting *Weinberger* as support for refusing to consider conceivable rationales when the actual rationale is known: *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 641 F.2d 1087 (3rd Cir. 1981). In that case, the Third Circuit concluded that its ability to consider purposes for classifications advanced by counsel or by itself was limited by *Weinberger* to those situations where it was not attributing to the government "purposes which it cannot reasonably be understood to have entertained." 641 F.2d at 1097. In other words, conceivable justifications can be used to fill in for actual justifications only where the justifications actually entertained are not known. Where the actual justifications are known the government cannot reasonably be understood to have entertained others. Thus, in a situation like *Anderson* where we know the purpose of § 2951(2) was remedying a perceived violation of the Establishment Clause, the *Delaware River Basin Commission* and *Christian Science Reading Room* cases interpret *Weinberger* to preclude consideration of any other justifications, in direct conflict with *Anderson*.

B. *ANDERSON*'S INTERPRETATION OF EXCESSIVE ENTANGLEMENT CONFLICTS WITH *WITTERS*, *ZELMAN*, AND THE THIRD CIRCUIT'S *TENAFLY* DECISION

Perhaps recognizing the weakness of its application of *Weinberger*, the *Anderson* Court also asserts that

"excessive entanglement between religion and state, a component of Establishment Clause analysis, was an original justification for the statute and is asserted by the State" in *Anderson*. 895 A.2d at 960. The Court finds that "[i]t remains conceivable, even after *Zelman*, that under some set of facts funding tuition for sectarian schools would run afoul of the Establishment Clause on excessive entanglement grounds." *Id.* That conclusion represents a fundamental misunderstanding of this Court's application of the excessive entanglement component of the *Lemon* test for Establishment Clause violations.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-part test for Establishment Clause challenges, the third part of which required that a challenged program be capable of being administered without excessively entangling the state with religion. It then used the excessive entanglement prong to strike down a program of subsidies for private school teachers teaching secular subjects. The program required that the subsidized courses had to be secular to avoid advancing religion. This Court found that an excessive entanglement of the state with religion would result from the continuing surveillance necessary to ensure that teachers under religious control and discipline did not bring religion into the secular subjects the government was paying them to teach.

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court addressed a program in which publicly-employed teachers were sent into private religious schools to teach secular remedial courses and found that such aid would not excessively entangle the state with religion because the supervision necessary to ensure that religion did not seep into the remedial classes was not excessive. In so holding,

Agostini distinguished between direct aid cases that support religious schools as institutions and indirect aid cases that aid students and where any benefit to the schools they attend occurs incidentally to the receipt of aid by the students. In direct aid cases, supervision is necessary to ensure that the aid does not support the religious functions of the schools. In indirect aid cases such supervision is unnecessary, because any aid to the religious function of the school is incidental and permissible.

Accordingly, in *Zelman*, as in *Witters*,[25] decided 16 years earlier, this Court was not concerned with the issue of excessive entanglement because it had concluded that the *Zelman* program was an indirect aid program, *i.e.*, one that was religiously-neutral in structure and where whatever benefits flowed to religious schools did so as a result of the free and independent choices of the students' families. Such programs do not require the state to police the program to prevent aid to the religious function of the schools attended by the program's beneficiaries, and pervasively sectarian schools and universities may participate on an equal basis.

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[25] In *Witters* this Court unanimously upheld the provision of government aid to a student attending a pervasively religious college to pursue a religious vocation, noting that whatever benefit accrued to the school was incidental to his free and independent choice of the school. Because the aid to the school was indirect, no ongoing surveillance was necessary to ensure the effects of the aid were limited to secular functions or activities. If such surveillance were required in indirect aid cases, it would inevitably be excessive because virtually all aspects of a pervasively-sectarian school's activities are imbued with religion, because that is the definition of a pervasively sectarian institution. As *Anderson* found, all the schools the petitioners' children attend are pervasively sectarian. 895 A.2d at 950.

The excessive entanglement concerns discussed in the 1980 AG Opinion were premised on the improper view of the program as providing direct assistance. As previously noted, the Opinion mistakenly treated the relationship between the tuitioning districts and the schools receiving tuition payments on behalf of the students who choose them as one of direct aid to the schools. (This is, of course, part and parcel of the general failure of the Opinion to recognize the proper legal differences between paying tuition pursuant to a contract with a private school to educate all of a district's high school students and paying tuition in towns that allow parents to choose the schools their children attend.) The Opinion mistook the parent-directed tuition payments to the schools for direct aid. Consequently, the Opinion discusses excessive entanglement in the context of a direct aid program in which all aided activities must be secular and policed. The AG Opinion and its subsequent enshrinement in the education code were in no way premised on excessive entanglement concerns relevant to indirect aid programs.

In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), the Third Circuit, by contrast with the decision below, followed the correct approach toward the entanglement prong of the *Lemon* test. Addressing the local government's argument that continuing to let a religious group use its telephone poles to create an "eruv," a religious zone for Sabbath purposes, would constitute an actual violation of the Establishment Clause, the court stated that entanglement only "matters . . . in the context of direct aid to parochial schools, where the Court subsumes it within the 'effect' analysis, see *Agostini v. Felton*, and in the rare case where government delegates civic power to a religious group." *Tenafly*, 309 F.3d at 175

n.36 (citations omitted). See also *L. M. v. Evesham Twp. Bd. of Educ.*, 256 F. Supp.2d 290, 305 (D. N.J. 2003) ("Entanglement is not an issue in indirect aid cases like the one presented here").

C. THIS COURT'S PRECEDENTS DO NOT ACCEPT ERRONEOUS INTERPRETATIONS OF THE ESTABLISHMENT CLAUSE AS EXCUSES FOR DISCRIMINATION AGAINST RELIGION

In her concurring opinion in *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 717 (1994), Justice O'Connor stated that "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." It should go without saying that an erroneous interpretation of the Establishment Clause is even less of a warrant for discriminating against religion, but *Anderson* disagrees. This Court has confronted many instances where governments have claimed the Establishment Clause requires that they exclude or otherwise discriminate against religious participants in some manner. Where this Court has concluded that in fact the Establishment Clause does not require discrimination, it has not hesitated to strike down those classifications. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Widmar v. Vincent*, 454 U.S. 263 (1981). Implicit in these cases is the understanding that a mistaken interpretation of the Constitution does not provide a legitimate basis for religious discrimination. In all of these cases, the results of this Court's decisions were that

religious entities would receive benefits amounting to subsidies for activities containing religious elements, but under religiously-neutral criteria. Only very recently has this Court allowed a state to discriminate against religion without the Establishment Clause requiring it, and then only in very limited circumstances. *Locke v. Davey*, 540 U.S. 712 (2004). *Anderson* misreads that decision to justify Maine's continuing discrimination against parents seeking to use the tuitioning program to send their children to religious schools.

II. ANDERSON'S MISINTERPRETATION OF *LOCKE V. DAVEY* UNDERCUTS THE FEDERAL RELIGION CLAUSES

In *Locke*, this Court addressed an indirect aid program for the first time since upholding the Cleveland Program in *Zelman*. Although finding that *Locke*'s Promise Scholarship Program comported with *Zelman*'s Establishment Clause standards, this Court nevertheless permitted the state to invoke a more restrictive religion clause of the Washington Constitution to deny Promise Scholarships to students pursuing degrees in "devotional theology" leading to religious vocations. This Court found that the program's exclusion fell into an area between the two Federal Religion Clauses, holding that not all actions permitted by the Establishment Clause are required by the Free Exercise Clause. Quoting from *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), which upheld against Establishment Clause challenge the widespread practice of tax exemptions for charitable bodies, including religious entities, this Court said "we have long said that 'there is room for play in the joints' between [the Clauses]." *Locke*,

540 U.S. at 718. Based on an historical analysis of the efforts of many states to avoid state funding of ministers and their training as manifested in their state constitutions, *Locke* concluded by stating that "[i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

This Court's "play in the joints" metaphor implies that the room between the two religion Clauses is quite narrow, and much of the *Locke* opinion is concerned with emphasizing how narrow its holding is. The opinion is replete with limiting language concerning the uniqueness of the ministerial training exclusion and the extent to which the program includes religious benefits despite the exclusion of devotional theology majors. *Anderson*, however, and the First Circuit in *Eulitt* (on which the *Anderson* court relies heavily), ignore the limitations emphasized in *Locke* and extend its holding to the point where the "play in the joints" exception is no longer narrow at all, but separates the two Religion Clauses so far that they can no longer perform their joint function of protecting religious liberty.

Far from being premised on a longstanding state constitutional tradition similar to avoiding the funding of ministers and their training, Maine's exclusion of students choosing religious schools is based on a 25-year-old misunderstanding of the Establishment Clause. Maine's Constitution not only lacks both the sort of religion clauses this Court relied on in *Locke*[26] and the Blaine Amendments properly disparaged by the plurality in *Mitchell v. Helms*,

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[26] The eight state constitutions cited in *Locke*, 540 U.S. at 723, all contain "compelled support clauses" stating that no one shall be compelled to support or attend any religious ministry without his or her consent.

530 U.S. 793, 829 (2000), as "born of bigotry" toward Catholics,[27] it contains an education article enacted in 1819 authorizing state grants for the founding of private – including religious – schools and permitting the tuitioning of students to such schools.[28] Thus, unlike *Locke* where the refusal to fund ministerial training reflected Washington's longstanding state constitutional tradition, in Maine the exclusion of families choosing religious schools contradicted a much older state constitutional tradition of supporting students attending private schools on a religion-neutral basis.

Unlike the "relatively minor burden on Promise Scholars" that Washington's ministerial training exclusion imposed, *Locke*, 540 U.S. at 725, Maine's § 2951(2) denies petitioners a state-funded high school education for their children at the school of their choice – simply because the school happens to be religious. Each family will spend well over $20,000 for each child's high school education, and each couple works three, and sometimes four, jobs in order to pay the tuition denied them by § 2951(2).

Finally, while this Court could say in *Locke*, "we believe that the entirety of the Promise Scholarship Program goes a long way to including religion in its benefits," § 2951(2) excludes religion entirely from its

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[27] Blaine Amendments, which are found in some 37 state constitutions, generally prohibit appropriations for the aid or support of sectarian schools. See, *e.g.*, Mark DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (2003); and Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657 (1998).

[28] Article VIII, pt. 1, § 1, attached at App. 63.

benefits. It excludes all students choosing a religious high school from the tuitioning program. Whereas Promise Scholars in Washington can "attend pervasively religious schools, so long as they are accredited," *id.* at 724, petitioners' children cannot. Promise Scholars can even take devotional theology courses, so long as they do not major in devotional theology, *id.*, but petitioners' children cannot take any devotional religion classes.

These factors led this Court in *Locke* to reject Davey's presumption of unconstitutionality under the Free Exercise Clause. In *Anderson*, these same factors should have led not only to a presumption of unconstitutionality, but to a finding of a violation of both Religion Clauses.

A. UNLIKE IN *LOCKE*, NO HISTORICAL TRADITION SUPPORTS PREVENTING PARENTS FROM USING STATE AID TO ATTEND RELIGIOUS SCHOOLS

In their decisions in *Anderson* and *Eulitt*, the Maine Supreme Court and the First Circuit greatly expanded *Locke*'s scope from a refusal to fund students training for religious vocations to a refusal to fund students choosing to attend religious secondary schools. Even though *Locke* is replete with statements that it involves the narrow issue of training for the ministry, these courts have taken out of context the single instance where the decision uses arguably broader language: "The State has merely chosen not to fund a distinct category of instruction." *Locke*, 540 U.S. at 944. While in context it is clear this Court was referring to religious vocational training as the "distinct category of instruction," these lower courts have chosen to read the phrase as allowing Maine to exclude the very forms of religious education this Court specifically noted

the Washington Program allowed participants to obtain. If this over-reading of *Locke* is allowed to stand, every state could exclude families choosing religious schools from any school choice program. While school choice programs are still rare at the elementary and secondary education levels, virtually all states provide student assistance grants and subsidized loans at the postsecondary level. Modeled on the religiously-neutral federal higher education student assistance programs such as the GI Bill, Pell Grants, and Guaranteed Student Loans, these state programs have traditionally permitted students to select religious colleges and universities, but *Anderson* would support extending *Locke*'s exclusion to all such colleges.

Neither the United States in general nor Maine in particular have an historical tradition justifying the broad exclusion of religion from publicly-funded elementary and secondary education analogous to the historical tradition of not funding the salaries and religious training of ministers. On the contrary, the public or common schools were originally conceived and operated as generically (nondenominationally) Protestant institutions, which is why Roman Catholics such as Amanda Donahoe found them so inhospitable, leading to the creation of Catholic parochial schools.[29] This also explains why this Court had to devote such a large proportion of its modern Religion Clause jurisprudence to purging religion from the public schools in pursuing the principle of religious neutrality. But neutrality does not mean hostility. When this Court upheld releasing public school students on school time to

[29] Lloyd Jorgenson, *The State and the Non-Public School 1825-1925* 111-145 (1987).

go off-site to religious centers for religious instruction in *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), it said:

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Prior to 1980, Maine's tuitioning system epitomized a publicly-funded but religiously-neutral system. While traditional public schools continued into modern times to include generically Protestant religious exercises, Maine allowed families to choose what sort of school to which to send their children. The state's interest in a well-educated citizenry was met through requiring these schools to meet various curriculum and certification requirements, while parents' desires for an exclusively secular or religious education were also met. Indeed, the irony that Maine, the home state of James G. Blaine for whom the Blaine Amendments are named, does not have a Blaine Amendment in its constitution while 37 other states do, is explained by the fact that in 1924 the Maine legislature rejected a proposed Blaine Amendment because some 42 Protestant and two Catholic schools received state subsidies.[30]

Thus, whatever the significance of this Court's finding that there existed a longstanding historical tradition of

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[30] Helmreich, *supra* note 2, at 50.

prohibiting vocational training for the ministry to the Promise Scholarship Program in *Locke*, no such similar tradition justifies broadening the application of *Locke* to include school choice programs like Maine tuitioning. Limited to vocational training for the ministry, the discrimination against a "specific category of instruction" permitted by *Locke* creates a narrow exception to the general principle that government classifications should not discriminate for or against religion that is embodied in the federal Religion Clauses. *Anderson* and *Eulitt*'s expansive gloss on *Locke* to include all education with religious components plainly infringes on religiously-motivated activity in violation of the Free Exercise Clause and inhibits or hinders religion in violation of the Establishment Clause.

B. CONTRARY TO *LOCKE*, § 2951(2) PROVIDES NO BENEFITS TO RELIGION AND IMPOSES MORE THAN A "RELATIVELY MINOR BURDEN"

In distinguishing *Locke* from *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), this Court reasoned that the fact that Washington's "Promise Scholarship Program goes a long way toward including religion within its benefits" negated an inference of hostility towards religion. *Locke*, 540 U.S. at 724. This Court emphasized that Promise Scholars could attend pervasively religious colleges and take religion courses, including courses in devotional theology. With respect to Maine's tuitioning program, however, attending a pervasively religious high school and taking required religion courses means students are disqualified from having their tuition

paid. Because of § 2951(2), religion receives absolutely no benefits under the program.

Lukumi focused on hostility towards religion, because the challenged actions were facially neutral and the defendant's motivation converted an ostensibly neutral act into one hostile to religion. In this case, § 2951(2) on its face singles out religion for adverse treatment, and there is no need to seek out the motivation of its creators to make it an action based on religion. Similarly, *McDaniel v. Paty*, 435 U.S. 618 (1978), did not require that Tennessee's disqualification of ministers for state elective office be based on hostility or animus before it found a Free Exercise violation. What is common to these cases is that they all specifically and deliberately placed religion at a disadvantage not justified by Establishment Clause concerns.

If Maine had simply ordered John Bapst Catholic High School to close because it was a religious school, this Court would not have inquired as to whether that was a hostile act: it would have applied the *Lemon* test and found that closing the school had a primary effect of inhibiting or hindering religion.[31] That effect is in no way lessened by the fact that Maine killed Bapst by denying tuition payments to its students because it was a religious school. The effect is the same, closure of the school; the reason is the same, that it was religious. Before 1980

[31] This hypothetical is not quite as farfetched as it may sound. In *Bangor Baptist Church v. Maine Dep't of Educ. and Cultural Servs.*, 576 F. Supp. 1299 (D. Me. 1983), the federal district court rebuffed efforts by Maine's Attorney General and Education Commissioner *to close all unapproved religious schools*, at precisely the same time they told John Bapst Catholic High School and the other religious schools approved for tuition payments that they could no longer receive such payments.

Maine's tuitioning program included religion in its benefits, and afterwards it did not. Section 2951(2) treats religious schools and families like petitioners as second-class citizens by denying them the benefit of a publicly-funded secondary education at the school of their choice, while extending that benefit to others.

Locke found the loss of the scholarship imposed a relatively minor burden on Promise Scholars. This referred to the modest size of the scholarships ($2,667) and to the fact that one could retain the scholarship and still take devotional theology courses and attend religious colleges, as long as one did not declare a religion major. In *Anderson*, § 2951(2) denies the petitioners tuition payments, for four years of high school worth over $20,000. Moreover, secondary school attendance is compulsory and part of students' entitlement to a publicly-supported education. Thus, the benefit denied by § 2951(2) is both quantitatively larger and qualitatively different. To send their children to their high school of choice petitioners must sacrifice their entitlement to a state-supported secondary education, unlike parents preferring secular private or public schools.

CONCLUSION

In 1854 the Maine Supreme Court failed to protect Amanda Donahoe, a member of a newly-arrived religious minority, from religious discrimination. For refusing to participate in a religious exercise, she was expelled from school and denied a free public education. In 1980 the Maine Attorney General misapplied the principle of religious neutrality underlying the Establishment Clause

and caused a religious high school to close and students attending religious schools to lose their entitlement to tuition payments. In *Anderson* the Maine Supreme Court has again failed a religious minority, those individuals who prefer to send their children to religious schools. This denial discriminates against religion on its face and lacks a rational basis. As such, *Anderson* conflicts with decisions of this Court and two federal Circuit Courts, and egregiously overextends *Locke v. Davey*.

Petitioners respectfully request that this Court issue a writ of certiorari to review, reverse, and remand *Anderson*.

Respectfully submitted,

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APPENDIX A

JULIA ANDERSON et al. v. TOWN OF DURHAM et al.

Docket: Cum-04-591

SUPREME JUDICIAL COURT OF MAINE

2006 ME 39; 895 A.2d 944; 2006 Me. LEXIS 39

March 24, 2005, Argued; February 14, 2006, Reargued April 26, 2006, Decided

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JUDGES: Panel: SAUFLEY, C.J., and CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ.*

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* Justice Paul L. Rudman sat at the first oral argument and participated in the initial conference, but retired before this opinion was certified.

Although not available at the second oral argument, Justice Calkins participated in this opinion. *See* M.R. App. P. 12(a) (stating that a "qualified justice may participate in a decision even though not present at oral argument").

Majority: SAUFLEY, C.J., and DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ. Concurrence: SAUFLEY, C.J., and LEVY, J. Dissent: CLIFFORD, J.

OPINION BY: ALEXANDER

OPINION: ALEXANDER, J.

[*P1] In this case, we review again whether Maine's tuition payment statute, 20-A M.R.S. § 2951(2) (2005), violates the First and Fourteenth Amendments of the United States Constitution. The statute authorizes the use of public funds to pay tuition at approved private schools on behalf of students who live in districts that do not operate a public high school, provided the school is nonsectarian. We upheld section 2951(2) against a constitutional challenge in *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127. The plaintiffs assert that a subsequent decision of the United States Supreme Court, *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002), that upheld the constitutionality of an Ohio tuition voucher program, has changed the law and compels a determination that the prohibition on payments for tuition to attend sectarian schools now violates the United States Constitution. More recent federal court decisions and our review of the current state of the law confirm that the choice the Legislature made in enacting section 2951(2) continues to be a valid, constitutional enactment. Accordingly, we affirm the summary judgment entered in the Superior Court (Cumberland County, Crowley, J.) holding that section 2951(2) is constitutional.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

[*P2] The constitutional requirements at issue in this case are stated in the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution.[1] The First Amendment states, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[*P3] The statute at issue is 20-A M.R.S. § 2951(2). Title 20-A M.R.S. § 2951 (2005) states in part: "A private school may be approved for the receipt of public funds for tuition purposes only if it: . . . (2) . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."

II. LEGAL HISTORY

[*P4] We extensively discussed the history and nature of section 2951(2) in *Bagley,* 1999 ME 60, ¶¶ 2-5, 728 A.2d at 130-31. Title 20-A authorizes the Department of Education and school districts to provide a public education in a variety of ways. A school district may build its own high school, or it may contract with another school district or private school that meets State school approval criteria for tuition purposes. 20-A M.R.S. § 2701 (2005). Parents in communities that do not have a public high school[2] may elect to send their children to a public high

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[1] The plaintiff parents in this case assert only federal constitutional claims.

[2] Title 20-A M.R.S. § 2701 (2005) applies to children in any grade. Only high school is at issue in this case.

school or an approved private school. *Id.* Public funds are used to pay to the selected high school a set amount towards tuition costs that is based on an anticipated public high school tuition cost, set pursuant to 20-A M.R.S. §§ 5805, 5806, 5808 (2005). School approval criteria include either accreditation by the New England Association of Colleges and Secondary Schools, or compliance with State requirements including basic instruction in designated curriculum,[3] certification of teachers, length of school day, and student-teacher ratios. 20-A M.R.S. §§ 2901, 2902 (2005).

[*P5] Before 1980, Maine's tuition statute permitted payment of public funds to approved sectarian schools for tuition payment purposes. In 1980, in response to an inquiry from a member of the Legislature, Maine's Attorney General issued an opinion stating that using public funds to pay tuition at private, religious schools violated the Establishment Clause. Op. Me. Att'y Gen. 80-2. The Legislature then enacted section 2951(2), which precluded sectarian schools from being approved for receipt of public tuition funds. P.L. 1981, ch. 693, § 5.

[*P6] The tuition payment statute imposes a number of obligations on schools that receive public tuition funds. It states:

> **§ 2951. Approval for tuition purposes**
>
> A private school may be approved for the receipt of public funds for tuition purposes only if it:

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[3] Pursuant to 20-A M.R.S. § 4722 (2005), secondary school curriculum requirements include English, social studies, mathematics, science (including a laboratory science) and fine arts.

1. Basic approval. Meets the requirements for basic school approval under subchapter I;

2. Nonsectarian. Is a nonsectarian school in accordance with the First Amendment of the United States Constitution;

3. Incorporated. Is incorporated under the laws of the State of Maine or of the United States;

4. Repealed. Laws 1983, c. 859, § A, 8.

5. Additional requirements. Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. Student assessment. Any school that enrolls 60% or more publicly funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of students; and

7. Release of student records. Upon the request of a school unit, release copies of all student records for students transferring from the private school to the school unit.

20-A M.R.S. § 2951 (2005).

[*P7] *Bagley* upheld section 2951(2) in the face of a First and Fourteenth Amendment challenge.[4] At that time,

[4] The parents in *Bagley* also asserted claims under the related provisions of the Maine Constitution. We addressed those claims "with the understanding that the rights guaranteed by the United States

(Continued on following page)

another group of parents brought suit in federal court challenging section 2951(2). The Court of Appeals for the First Circuit determined that section 2951(2) was constitutional in *Strout v. Albanese,* 178 F.3d 57, 66 (1st Cir. 1999).

[*P8] In *Zelman*, the United States Supreme Court upheld the constitutionality of an Ohio tuition voucher program that authorized the use of public funds to pay for a child's education at any approved school selected by the parents, including a religious school, determining that the particular program did not conflict with the Establishment Clause. 536 U.S. at 652-53.

[*P9] After the Supreme Court decided *Zelman*, a bill to repeal section 2951(2) was introduced in the Maine Legislature. L.D. 182 (121st Legis. 2003). The bill did not pass. Thereafter, the plaintiffs initiated this lawsuit to test the constitutional viability of section 2951(2) after *Zelman*. As before, a different group of parents brought suit in federal court, challenging section 2951(2) on similar grounds. The federal case culminated in a decision of the Court of Appeals for the First Circuit holding that, even after *Zelman*, the Constitution does not require the State of Maine to fund tuition at sectarian schools. *Eulitt v. State of Me., Dep't of Educ.,* 386 F.3d 344 (1st Cir. 2004). Also, in 2004, the United States Supreme Court, in *Locke v. Davey,* 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004), held that a publicly funded Washington State college scholarship program could, without violating the

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Constitution and the Maine Constitution are coextensive." *Bagley v. Raymond Sch. Dep't,* 1999 ME 60, ¶13, 728 A.2d 127, 132.

constitution, prohibit use of the funds for pursuit of a devotional theology degree. *Id.* at 725.

III. FACTUAL AND PROCEDURAL HISTORY

[*P10] The facts in this case are largely stipulated and are not in dispute. The plaintiffs are parents of high school age children who reside in Minot, Raymond, and Durham.[5] The school administrative units within these towns do not operate a public high school. Minot has contracted with the Town of Poland to provide a secondary education to ninety per cent of Minot's students. A student's family may apply to attend another high school, and approval is given on a case-by-case basis, based on educational program requirements.

[*P11] Raymond has contracted with the Town of Windham to take fifty percent of Raymond's high school students beginning in 2003.[6] The City of Westbrook has agreed to enroll as many of Raymond's high school students as Raymond wishes. As of October 1, 2003, twenty-five high

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[5] As this action has been pending for some time, it is likely that the school attendance of some of the individuals who were attending high school when suit was filed has changed. However, there is no question that the issue presented for decision by this action is a question of great public concern and an issue that repeatedly arises for parents of children attending high school in communities that tuition their high school students to other public and private high schools. Thus, this case appropriately proceeds under generally recognized exceptions to the mootness doctrine. *See Consumers for Affordable Health Care, Inc. v. Superintendent of Ins.*, 2002 ME 158, ¶¶ 18-19, 809 A.2d 1233, 1239-40; *Me. Civil Liberties Union v. City of S. Portland*, 1999 ME 121, ¶10, 734 A.2d 191, 195.

[6] The dates referenced in this opinion reflect the most current information available from the Superior Court record.

school students from Raymond, supported by public funds, attended approved private high schools.

[*P12] Durham does not have a contract with any neighboring school district, but most of its high school students attend Brunswick High School. As of April 1, 2004, three high school students from Durham attend approved private high schools with public funds.

[*P13] The plaintiffs are parents who have elected to send their children to private religious schools that do not qualify as nonsectarian schools for payment of tuition with public funds. For the 2002-2003 school year, one student attends a pervasively sectarian[7] Seventh Day Adventist school. Courses in the religion are required, and students must attend chapel and religious assemblies. Students at these schools cannot avoid Seventh Day Adventist teachings.

[*P14] The remaining students attend St. Dominic's Regional High School in Auburn. St. Dominic's is a private, pervasively sectarian Roman Catholic High School operated under the authority of the Roman Catholic Bishop of Portland. Its admissions policy gives preference to students whose families are registered members of Catholic parishes. Participation in religious classes and the spiritual life of the school is mandatory, and students cannot avoid Catholic teachings. Applicants for teaching positions must mirror "gospel values" and understand the role of the school as a "unique pastoral, educational agency of the church." Some of the parents chose St. Dominic's because

[7] A school is pervasively sectarian when a "substantial portion of its functions are subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973).

of its academic program and what they perceive as a stronger level of discipline; some because of sports opportunities; some because the school promotes their sincerely held beliefs as Catholics.

[*P15] None of the parties asserts that their religious beliefs mandate that they send their children to religious schools.

[*P16] The parents brought this action against each of the Towns, the Town School Departments, and Town School Superintendents (the Town Defendants), as well as the Maine Department of Education and the Commissioner (the State). They seek (1) a declaratory judgment that section 2951(2) violates the Establishment, Free Exercise, and Equal Protection clauses of the First and Fourteenth Amendments to the United States Constitution; (2) an injunction that would forbid the Town Defendants from enforcing section 2951(2); and (3) reimbursement from the Towns for tuition paid to the religious schools, attorney fees, and costs. The parents seek to hold the Town Defendants liable pursuant to 42 U.S.C.A. § 1983 (West 2003), on the ground that they deprived plaintiffs of their constitutional rights under color of state law.

[*P17] The Maine Civil Liberties Union and nine residents of the Town of Raymond have intervened as defendants in support of the continuing validity of section 2951(2).

[*P18] The trial court granted in part the Town Defendants' motions to dismiss, on the ground that the complaint failed to state a claim upon which relief may be granted pursuant to 42 U.S.C.A. § 1983. After discovery, the remaining parties filed cross-motions for summary

judgment. The parties filed an extensive joint stipulation of facts, as well as separate statements of material facts. The Superior Court entered a summary judgment in favor of the State, holding that section 2951(2) did not violate the Constitution. The parents appeal both the order dismissing the Town Defendants and the summary judgment entered in favor of the State. Because we determine that section 2951(2) does not violate the United States Constitution, we do not reach the issues raised on appeal from the order dismissing the Town Defendants.

IV. GOVERNING PRECEDENTS

A. Standard of Review

[*P19] We review trial court rulings on issues of law and statutory interpretation de novo. *See Ashe v. Enter. Rent-A-Car,* 2003 ME 147, ¶7, 838 A.2d 1157, 1159. When reviewing the constitutionality of a statute, we "begin with the basic principle of statutory construction that 'this Court is bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements.'" *Bagley,* 1999 ME 60, ¶14, 728 A.2d at 133 (internal citations omitted).

[*P20] In our review of the constitutional issues presented in this case, we are aided by our own precedent and by recent opinions of federal courts that inform our decision-making on all major issues presented to us in this appeal. Accordingly, we recount our holding in *Bagley,* examine the law as it has evolved since we decided *Bagley,* and analyze the impact of current law on the claims before us.

B. *Bagley v. Raymond School Department*

[*P21] In *Bagley,* after reviewing First and Fourteenth Amendment jurisprudence involving public funding of religious schools, we determined that section 2951(2) did not violate those constitutional provisions. 1999 ME 60, ¶72, 728 A.2d at 147. We stated that the issue was *not* whether a particular program in which state funds are used to benefit religious schools violates the constitution, but whether a "tuition program that specifically *excludes* religious schools" does so. *Id.* ¶11, 728 A.2d at 132 (emphasis added). The inquiry is the same in the current challenge to section 2951(2).

[*P22] We undertook our analysis in *Bagley* in three parts, examining separately whether section 2951(2) violates the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution.

1. Free Exercise Clause

[*P23] The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . " U.S. CONST. amend. I.[8] Upon a challenge to government action on Free Exercise grounds, the inquiry is "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Bagley,* 1999 ME 60, ¶16, 728 A.2d at 133 (quoting *Hernandez v.*

[8] The religion clauses of the First Amendment are applicable to the states. *Cantwell v. Conn.*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

Comm'r, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989)).

[*P24] The party challenging a statute on free exercise grounds must initially demonstrate that: (1) the activity burdened by the regulation is motivated by a sincerely held religious belief; and (2) the challenged regulation restrains the free exercise of that religious belief. *Blount v. Dep't of Educ. & Cultural Servs.,* 551 A.2d 1377, 1379 (Me.1988). If the challenger meets that initial burden, the burden shifts, and the State can prevail only by proving that (1) the challenged regulation is motivated by a compelling state interest, and (2) no less restrictive means can adequately achieve that compelling state interest. *Id.*

[*P25] The parents in *Bagley* contended that section 2591(2) violates the Free Exercise Clause by burdening their fundamental right to send their children to religious schools. Because it is "not within the judicial ken to question the centrality of particular beliefs," *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *Hernandez,* 490 U.S. at 699), we assumed *arguendo* that the parents' desire to send their children to religious schools was motivated by a sincerely held religious belief. 1999 ME 60, ¶18, 728 A.2d at 134. We determined, however, that no substantial burden had been placed on activity motivated by religious belief, because a statute that merely operates to make the practice of an individual's religious beliefs more expensive does not violate the Free Exercise Clause. *Id.* (citing *Goodall v. Stafford County Sch. Bd.,* 60 F.3d 168, 171 (4th Cir. 1995)). We further observed that the parents were "no more impaired in their efforts to seek a religious education for their

[children] than are parents of children in school districts that provide only a free nonreligious education in public schools." *Bagley,* 1999 ME 60, ¶18, 728 A.2d at 135.

2. Establishment Clause

[*P26] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. It prevents a state from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion, *Agostini v. Felton,* 521 U.S. 203, 222-23, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), or from creating an excessive entanglement between government and religion,[9] *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). While the Free Exercise Clause addresses the "negative" by prohibiting the government from interfering with religious practice, the Establishment Clause addresses the "affirmative" by prohibiting the government "from sponsoring or establishing a religion."[10] *Bagley,* 1999 ME 60, ¶21, 728 A.2d at 135.

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[9] In *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997), the Supreme Court described the inquiry into whether a government aid program gave rise to excessive entanglement between the government and religion as part of the inquiry into whether the program had the impermissible primary effect of aiding or inhibiting religion. *Id.* at 232. The Court essentially collapsed the three-part purpose-effect-entanglement test, commonly referred to as the "Lemon" test, into a two-part inquiry, examining the excessive entanglement prong in terms of whether the challenged activity has the effect of advancing religion. *Id.*; *see also Bagley,* 1999 ME 60, ¶46, 728 A.2d at 141.

[10] For example, the United States Supreme Court has held that the Establishment Clause prohibits government action that creates a denominational preference among religions, *Larson v. Valente,* 456 U.S.

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[*P27] We determined in *Bagley* that there is "no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools." *Id.* ¶22, 728 A.2d at 135-36. We reasoned:

> Distilled to its essence, the Establishment Clause prohibits the government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it. It has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion.

Id. (footnote omitted). Accordingly, we determined that the prohibition against approving religious schools to receive public tuition funds did not violate the Establishment Clause. *Id.*

3. Equal Protection Clause

[*P28] The Equal Protection Clause of the Fourteenth Amendment forbids any state from denying "to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, and requires, generally, that persons similarly situated be treated alike. *See Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 72

228, 246, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 714, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994) (O'Connor, J., concurring), and prohibits the improper delegation of government authority to a religious entity, *Grumet,* 512 U.S. at 696-97 (opinion of Souter, J.).

L. Ed. 2d 786 (1982). Article 1, section 6-A of the Maine Constitution includes similar requirements.[11]

[*P29] If government action that is challenged on equal protection grounds infringes on a fundamental constitutional right, or involves an inherently suspect classification such as race, it is subject to analysis under the strict scrutiny standard. *Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ.*, 659 A.2d 854, 857 (Me.1995). Strict scrutiny requires that the challenged action be narrowly tailored to achieve a compelling governmental interest. *See Butler v. Supreme Judicial Court,* 611 A.2d 987, 992 (Me.1992). If the government action does not implicate either a fundamental right or a suspect class, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *Sch. Admin. Dist. No. 1,* 659 A.2d at 857. When a statute is reviewed under the rational basis standard, it bears a strong presumption of validity. *See id.* Under the rational basis standard, the burden is on the party challenging the government action to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Eulitt,* 386 F.3d at 356.

[*P30] In *Bagley,* we did not address which level of scrutiny should be applied in analyzing whether section 2951(2) violated the Equal Protection Clause. Because the State proffered only one justification for the statute – compliance with the Establishment Clause – we determined

[11] Article I, § 6-A of the Maine Constitution states: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."

that the Establishment Clause analysis would define the scope of our Equal Protection inquiry. *Bagley,* 1999 ME 60, ¶32, 728 A.2d at 138. We reasoned as follows:

> If the exclusion of religious schools is not required by the Establishment Clause of the First Amendment, it must be struck down because the State offers no other reason for its existence. If the exclusion is required in order to comply with the Establishment Clause, the State will have presented a compelling justification for the disparate treatment of religious schools, and the parents' Equal Protection claim will fail. *See Widmar v. Vincent,* 454 U.S. 263, 271, 102 S. Ct. 269, 70 L. Ed. 2d 400 . . . (1981) (agreeing that compliance with constitutional obligations "may be characterized as compelling.").

Id. ¶33, 728 A.2d at 138.

[*P31] Even though the Supreme Court had begun to relax the strict prohibition against channeling public funds, at least indirectly, to religious schools,[12] we concluded that

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[12] *See Agostini,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (overruling *Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985) in which the Court had concluded that Establishment Clause was violated when public school teachers assisted underprivileged children in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (determining that Establishment Clause not violated when state paid for sign language interpreter for student at religious school); *Witters v. Wash. Dep't of Servs. for the Blind,* 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986) (holding grant of aid to a blind college student for ministerial training did not violate Establishment Clause); *Mueller v. Allen,* 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983) (upholding Minnesota law allowing taxpayers to deduct expenses incurred in providing education to children without regard to whether the school is religious).

the then-current Establishment Clause jurisprudence required Maine to continue to exclude religious schools from approval for state paid tuition. *Id.* ¶¶ 60-61, 728 A.2d at 144-45. We therefore upheld section 2951(2) on equal protection grounds. *Id.*

[*P32] Shortly thereafter, the First Circuit, presented with a similar constitutional challenge to section 2951(2), came to substantially the same conclusions that we had reached in *Bagley. Strout,* 178 F.3d at 66.

C. *Zelman v. Simmons-Harris*

[*P33] In *Zelman*, a group of Ohio taxpayers filed suit to enjoin an Ohio tuition assistance program that provided public funds for tuition at schools of the parents' choice, including private, religious schools. 536 U.S. at 648. The program had been enacted in response to a crisis in the Cleveland public schools. *Id.* at 644. All of the schools in the district were failing, and the federal district court had placed the entire school district under State control. *Id.* The State enacted the program "to provide educational choices to families with children who reside in the . . . District," where few parents in the district had the means to send their children to private schools. *Id.* at 643-44.

[*P34] Any private school, religious or nonreligious, was eligible to participate in the program, provided it was located within or adjacent to a covered district and met statewide educational standards. *Id.* at 645. Participating schools had to agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or

religion." *Id.* (quotation marks and citation omitted.) Tuition aid was distributed to parents according to financial need. *Id.* at 646. "Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school." *Id.* In the 1999-2000 school year, ninety-six percent of the children who participated in Ohio's tuition assistance program enrolled in religious-affiliated schools. *Id.* at 647.

[*P35] The Supreme Court determined that the Ohio program did not violate the Establishment Clause. The Court focused not on whether a religious institution benefited from receipt of public funds, but on the fact that the funds were channeled indirectly to that institution as a result of private choice. *Id.* at 652-53. The Court reasoned as follows:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id. at 652. Thus, after *Zelman*, public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause if the financial assistance program has a valid secular purpose, provides benefits to a broad spectrum of individuals who can exercise genuine private choice among religious and secular options, is paid through the students' parents, and is neutral toward religion. *Id.*

D. *Locke v. Davey*

[*P36] In *Locke*, the Supreme Court again addressed application of the First Amendment to educational funding issues. The Court upheld a Washington State college scholarship program that prohibited the use of scholarship funds for pursuit of a devotional theology degree. 540 U.S. at 725. The restriction was authorized by Washington's state constitution.[13] In upholding the restriction, the Court reaffirmed that "'there is room for play in the joints'" between the religion clauses. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)). By this, the Court meant that "there are some state actions permitted by the Establishment

[13] State constitutional provisions, such as the one in *Locke*, that expressly forbid aid to religious schools to different degrees, may continue to present a barrier for state legislatures seeking to expand options for publicly funded education to religious schools. Krista Kafer, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439, 450-51 (2003). Many of these provisions, known as "Blaine Amendments" for the Maine Senator who unsuccessfully championed a similar proposed amendment to the United States Constitution, have their roots in conflicts between supporters of public schools and supporters of religious, often Catholic, schools in the late nineteenth century. *See Bagley*, 1999 ME 60, ¶13 n.8, 728 A.2d at 132-33. The Maine Constitution does not contain a Blaine Amendment. *Id.*

Clause but not required by the Free Exercise Clause." *Id.* at 719.

[*P37] The Court in *Locke* indicated that *Zelman* stands for the proposition that under the Establishment Clause, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.* at 719. Thus, the Court noted, if Washington State wished, it could, consistent with the Establishment Clause, *permit* scholarship recipients to pursue a degree in devotional theology. *Id.* The issue in *Locke* was whether Washington could *deny* such funding without violating the Free Exercise Clause. *Id.* The Court determined that it could. *Id.* at 725.

[*P38] Because the Court in *Locke* found no free exercise violation, it subjected the plaintiff's due process claim to rational basis scrutiny. *Id.* at 720 n.3. The Court noted that Washington State has a "historic and substantial" interest in not funding the pursuit of devotional degrees in order to avert the practice of state-sponsored clergy, a hallmark of established religion, which justified the limitation. *Id.* at 722, 725. Thus, the Court upheld the scholarship limitation, concluding, "[i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

E. *Eulitt v. State of Maine Department of Education*

[*P39] The parents in *Eulitt,* argued that the State's asserted interest in maintaining the sectarian school exclusion in order to avoid an Establishment Clause violation was no longer valid after *Zelman,* undermining the First Circuit's decision in *Strout.* 386 F.3d at 348-49.

[*P40] Because it concluded that the Free Exercise Clause "defines the scope of the fundamental right to religion incorporated by the Fourteenth Amendment's equal protection guarantee," *id.* at 353, the *Eulitt* court assessed whether section 2951(2) comports with the Free Exercise Clause, and then applied rational basis scrutiny "to any further equal protection inquiry," *id.* at 354. The court held that section 2951(2) imposes no impermissible burden on religion because it does not prohibit attendance at religious schools or prevent parents from choosing religious education for their children. *Id.* at 354-55. It reasoned that the guarantee of protection from government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they fund the secular equivalent of that activity. *Id.*

[*P41] Finding that section 2951(2) did not violate the parents' free exercise rights, the court stated that "we have no occasion to ponder whether Maine's Establishment Clause defense constitutes a compelling interest that justifies the challenged restriction." *Id.* at 356. The court applied rational basis scrutiny to the statute, pursuant to which the burden was on the parents as challengers of the statute to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." *Id.* In *Eulitt,* the parents conceded that if the rational basis test applied, their equal protection claim failed as a matter of law. *Id.*

[*P42] The Court in *Eulitt* read *Locke* broadly, stating that "the decision there recognized that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with

religion, even though the Establishment Clause may not require them to do so." *Id.* at 355.

V. ANALYSIS OF ISSUES

A. Motivation for Adoption of Section 2951(2)

[*P43] In the 1970s and early 1980s the trend in United States Supreme Court decision-making on Establishment Clause/Free Exercise issues strongly disfavored use of public funds for direct or indirect payments to religious institutions, including religious schools. *See Aguilar,* 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (holding that Establishment Clause prohibited sending public school teachers into private, religious schools to provide remedial education to disadvantaged children);[14] *Wolman v. Walter,* 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) (holding provision of instructional materials and transportation services to religious schools is not permitted; therapeutic services could be provided to religious school students off-site; funding for secular textbooks, testing, and diagnostic services upheld), *overruled in part by Mitchell v. Helms,* 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000); *Meek v. Pittenger,* 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975) (striking down in part a Pennsylvania law that provided loans of educational materials to religious schools), *overruled in part by Mitchell,* 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660; *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) (invalidating New York

[14] The result in *Aguilar* was changed by *Agostini,* 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, to allow such uses of remedial education personnel.

tax laws that provided direct money grants to qualifying non-public schools for maintenance and repair of facilities and equipment); *Lemon,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (invalidating programs that provided salary supplements to teachers of secular subjects in religious schools).

[*P44] This trend in Federal Court decision-making regarding cash payments that would go directly or indirectly to religious institutions, although relaxed somewhat in the late 1980s and early 1990s,[15] continued to influence United States District Court and Court of Appeals decisions, including the lower court decisions in *Zelman.*[16]

[*P45] Many of the actions that challenged use of public funds for religious purposes included claims for violation of civil rights pursuant to 42 U.S.C.A. § 1983, for injunctive relief, and for attorney fees pursuant to 42 U.S.C.A. § 1988. In 1983 actions, attorney fees could be awarded whether a party prevailed on the § 1983 claim or other grounds. *Farrar v. Hobby,* 506 U.S. 103, 109, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Further, state and local governments and officials faced a greater risk of liability and attorney fee awards where it could be demonstrated that they were aware that the challenged government actions were violative of constitutional rights and had failed to take corrective action. *Wood v. Strickland,* 420 U.S. 308, 322, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975) (holding school officials liable when they knew action

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[15] *See* n.12 and opinions cited therein.

[16] *Simmons-Harris v. Zelman,* 234 F.3d 945, 965 (6th Cir. 2000) (Ryan, J., concurring in part, dissenting in part); *Simmons-Harris v. Zelman,* 72 F. Supp. 2d 834, 853 (N.D. Ohio 1999).

taken would cause a deprivation of students' constitutional rights), *overruled in part by Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Hutto v. Finney,* 437 U.S. 678, 691-92, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) (upholding imposition of substantial attorney fee award where prison officials failed to correct Eighth Amendment violations that were the subject of a prior court order).

[*P46] Had the tuition subsidy program continued as it existed in 1980, paying public funds for tuition to religious schools, the program faced a high risk of a successful challenge that could have resulted in disruption of the entire tuition subsidy effort and a costly attorney fee award to be paid by Maine taxpayers. Thus, in the legal climate of 1980, the Maine Attorney General gave good advice regarding the propriety of using public funds to pay tuition at religious schools. The Maine Legislature acted prudently and responsibly in taking that advice and enacting section 2951(2).

[*P47] The actions of the Attorney General and the Legislature were not motivated by any religious animus and were motivated by a desire to respect and comply with the requirements of the Establishment Clause as then interpreted and applied by the United States Supreme Court.

B. Free Exercise and Limitation of Choice

[*P48] The parents assert that the government, when making a range of choices available to a group, may not limit those choices on the basis of religion without violating the Free Exercise Clause. The failure to consider

the neutrality problem, they argue, undermines the Free Exercise and Establishment Clause holdings in *Bagley.*

[*P49] A statute that is not neutral but either disfavors religion on its face or has been motivated by animosity against religion is subjected to heightened judicial scrutiny and can be justified only upon a demonstration of a compelling governmental interest in the statute. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531-32, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). A statute that is neutral and of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening a particular religious practice. *Smith,* 494 U.S. at 879-80; *Goodall,* 60 F.3d at 171, *cert. denied,* 516 U.S. 1046, 116 S. Ct. 706, 133 L. Ed. 2d 661.

[*P50] In *Locke,* the Supreme Court rejected the argument that the scholarship restriction was presumptively unconstitutional because it was not neutral with respect to religion, citing *City of Hialeah. Locke,* 540 U.S. 720. In *Hialeah,* the City had adopted ordinances that made it a crime to slaughter animals for reasons other than food consumption. The Supreme Court determined that, although neutral on their face, the ordinances were unconstitutional because they were aimed at suppressing the practice of ritualistic animal sacrifice among members of the Santeria religion. The Court found overwhelming evidence in the record that animosity against the Santeria religion had motivated the ordinances' passage, and struck them down. *Id.* at 535, 546.

[*P51] The Court in *Locke* distinguished the scholarship restriction from the ordinances in *Hialeah,* finding that although not neutral on its face, the scholarship

restriction nevertheless withstood constitutional challenge because

> [Washington's program] imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

540 U.S. at 720-21 (citations omitted) (footnote omitted).

[*P52] The *Eulitt* court assessed whether, after *Locke,* section 2951(2) was unconstitutional on the ground of non-neutrality. The court held that the mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity against religion, and found that the record contained no evidence that the statute had been motivated by such animosity. 386 F.3d at 355. Analyzing the factors set forth in *Locke* and *Hialeah,* the *Eulitt* court stated:

> Maine's decision not to extend tuition funding to religious schools does not threaten any civil or criminal penalty. By the same token, it does not in any way inhibit political participation. Finally, it does not require residents to forgo religious convictions in order to receive the benefit offered by the state – a secular education.

Id.

[*P53] In *Bagley* we suggested that section 2591(2) was not neutral on its face, and we subjected the statute to strict scrutiny. 1999 ME 60, ¶16 n.10, 728 A.2d at 133-34. Because we determined that the statute did not substantially

burden a religious practice, however, our analysis ended there. *Id.* ¶20, 728 A.2d at 135. The statements in *Bagley* regarding strict scrutiny did not have the benefit of the analysis in *Locke* and *Eulitt,* which clarified that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice. *Locke,* 540 U.S. at 720; *Eulitt,* 386 F.3d at 356. Although, with the benefit of the analysis in *Locke,* it is unnecessary to apply a strict scrutiny analysis, we continue to adhere to the view expressed in *Bagley* that section 2591(2) does not substantially burden a religious practice.

[*P54] A burden upon religion exists when "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.,* 450 U.S. 707, 717-18, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). None of the parties in this case has asserted that attendance at public or secular private schools is proscribed by their faith, or that they are being punished for engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs. The statute merely prohibits the State from funding their school choice, and as such, it does not burden or inhibit religion in a constitutionally significant manner.

[*P55] The fact that after *Zelman* the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue the religious school exclusion. *Locke*

recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.

C. Equal Protection and Rational Basis Analysis

[*P56] After *Zelman,* state payments for education that reach a religious school indirectly as the result of a free and independent choice of parents would not violate the Establishment Clause. This Court in *Bagley* and the First Circuit in *Strout* suggested that if the religious school exclusion were based on an erroneous understanding of the Establishment Clause, the statute could violate Equal Protection. *Bagley,* 1999 ME 60, ¶32, 728 A.2d at 138; *Strout,* 178 F.3d at 64 n.12. However, *Locke* and *Eulitt* have clarified that when performing the equal protection analysis in religious school funding cases, strict scrutiny applies only to the claim that the parents' fundamental right to the free exercise of religion is implicated; all other claims of religious discrimination are subject to rational basis scrutiny. *Locke,* 540 U.S. at 720 n.3; *Eulitt,* 386 F.3d at 354. Because we have found no free exercise violation, we apply the rational basis test. That test requires only that a fairly conceivable set of facts establish a legitimate government interest that would support the challenged classification. *Id.*

[*P57] The State proffers several justifications for section 2951(2), including Establishment Clause concerns not necessarily governed by *Zelman,* such as excessive entanglement between religion and state. Additional legitimate interests that the State offers include concerns about maintaining diversity within the public schools, and

avoiding involvement in discrimination in admissions and hiring by religious schools.

[*P58] The parents argue that the State is barred from offering additional, hypothetical rationales for the statute because the actual rationale is known, citing *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975). The Court stated in *Wiesenfeld* that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not have been* a goal of the legislation." *Id.* (emphasis added). This is a different proposition from stating that only the precise purposes articulated by members of the Legislature and recorded in the legislative record may be considered. Thus, we are not bound by the justification proffered by the State in support of the statute in *Bagley,* or offered in support of the legislation in 1981. The justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals. Avoiding excessive entanglement between religion and state, a component of compliance with the Establishment Clause, was an original justification for the statute, and is asserted by the State in this litigation.

[*P59] A court undertaking an excessive entanglement analysis ordinarily does so in the context of reviewing a state program that provides aid to religious institutions. *Bagley,* 1999 ME 60, ¶67 n.35, 728 A.2d at 146. Because we operate in terms of conceivable justifications, we can evaluate the hypothetical situation in which the State authorizes funding for tuition at sectarian schools. It remains conceivable, even after *Zelman,* that under some set of facts, funding tuition for sectarian

schools would run afoul of the Establishment Clause on excessive entanglement grounds. Furthermore, we cannot be certain that twenty-four years later, any sectarian schools would wish to accept entanglements that might arise from state oversight.[17]

[*P60] The record in this case is sparse as to the nature of the courses taught at the religious schools and their religious practices. Because the religious schools are not participating in this case, those issues are not central to our decision-making. However, it is possible to envision that there may be conflicts between state curriculum, record keeping and anti-discrimination requirements and religious teachings and religious practices in some schools. These conflicts could result in significant entanglement of State education officials in religious matters if religious

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[17] In this case, the parents have indicated that they are asserting only their rights, and that they are not attempting to assert rights of religious schools. Thus, no issue exists as to whether the parents have standing to assert alleged discrimination against the schools. In *Bagley*, because the case presented "an important issue worthy of evaluation," we reconfigured the parents' equal protection claim from one asserting the rights of the schools to the argument "that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school results in their own disparate treatment on the basis of their religion." 1999 ME 60, ¶26, 728 A.2d at 136 (emphasis omitted).

In *Eulitt v. State of Maine*, 386 F.3d 344 (2004), the First Circuit determined that the parents did not have standing to assert the claim that the State must fund private religious education to the extent it would fund private secular education. That claim, the court ruled, must be asserted by the schools. *Id.* at 352-53. The court found no basis to support third-party standing on that issue. *Id.* The court did determine that the parents had standing to seek an injunction against enforcement of section 2951(2) and a declaration of the statute's unconstitutionality. *Id.* at 353. The court therefore proceeded to address the merits of the case.

schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools. This concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2). Parental choice of the school does not sever the religion-state connection when payment is made by a public entity to the religious school and that payment subjects a school's educational and religious practices to state regulation.

VI. CONCLUSION

[*P61] After *Zelman*, the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* and *Eulitt* hold that it is not compelled to do so. Section 2951(2) falls within the "play in the joints" between the two religion clauses. Section 2951(2) neither improperly infringes on the free exercise of religion, nor violates the Establishment Clause. With respect to the parents' claim of religious discrimination based on the Equal Protection Clause, the statute does not infringe upon the fundamental right to free exercise of religion in a constitutionally significant manner. The remaining claims of religious discrimination are subject only to rational basis scrutiny. The State has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion.

The entry is:

Judgment affirmed.

CONCUR BY: LEVY

CONCUR: LEVY, J., with whom SAUFLEY, C.J., joins, concurring.

[*P62] In addition to the constitutional issues addressed by the Court, this case presents an important question of law concerning municipal liability that remains unaddressed.

[*P63] The nine municipal defendants consist of three Maine communities – Durham, Minot, and Raymond – and their school departments and school superintendents. In the early stages of this proceeding, the Superior Court dismissed the action as to eight of the nine defendants[16] because it concluded, in a reasoned decision applying *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and its progeny, that they cannot be held liable under 42 U.S.C.A. § 1983 (West 2003) for merely complying with and enforcing Maine's school voucher statute, 20-A M.R.S. § 2951 (2005). Before us, the plaintiffs contend that the Superior Court erred as to the three school departments and their superintendents, asserting that these defendants can be held liable under § 1983 even if Maine's tuition payment law left them "no choice in this matter other than to disobey state law."

[*P64] The plaintiffs' assertion that school districts and their superintendents may be found liable for failing to disobey an act of the Legislature presents a question of

[16] The Superior Court (Cumberland County, Mills, C.J.) had previously dismissed the claims against the ninth municipal defendant, the Town of Minot.

great public interest, thus qualifying as one of our recognized exceptions to the mootness doctrine. *See Ten Voters of City of Biddeford v. City of Biddeford,* 2003 ME 59, ¶9, 822 A.2d 1196, 1200. Our decision in *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127, also demonstrates that this question will escape review and reoccur in the future, therefore qualifying as another recognized exception to the mootness doctrine. *Ten Voters of City of Biddeford,* 2003 ME 59, ¶8, 822 A.2d at 1200. In *Bagley,* the trial court determined that the Raymond School Department could not be held liable pursuant to § 1983 for enforcing Maine's school voucher statute, but, as here, we limited our appellate review to the constitutional questions presented and did not reach the municipal liability question. 1999 ME 60, ¶10, 728 A.2d at 131.

[*P65] The purpose of this lawsuit is to test the constitutionality of Maine's tuition payment law, 20-A M.R.S. § 2951, a statute administered by the Maine Department of Education. I would reach the municipal liability issue that it presents because our resolution of that issue will provide guidance as to whether local governments and their officials should be made defendants in, and compelled to incur the expenses arising from, lawsuits that do not implicate their policies or discretionary acts.

DISSENT BY: CLIFFORD

DISSENT: CLIFFORD, J., dissenting.

[*P66] Title 20-A M.R.S. § 5204(4) (2005) allows parents residing in towns that lack public school systems to choose the schools their children attend by providing for tuition to be paid to public or private schools in other municipalities. Prior to a 1983 amendment to Maine's tuition statute, section 5204(4) was neutral toward religion, and

families residing in towns without their own public schools enjoyed a unique opportunity to send their children to private schools, including sectarian schools. The system worked very well, and offered parents broad choices in the education of their children, choices otherwise enjoyed only by families of some economic means.[19]

[*P67] The tuition statute's neutrality toward religion ended in the early 1980s, however, when 20-A M.R.S. § 2951(2) (2005) was enacted to limit those private schools approved for the receipt of public tuition funds to "nonsectarian school[s] in accordance with the First Amendment of the United States Constitution." P.L. 1981, ch. 693, § 5. This amendment denied parents the opportunity to send their children to sectarian schools within the program established by section 5204(4). The amendment was enacted following an opinion issued by the Attorney General, and was justified *solely* because it was thought at that time to be required by the Establishment Clause of the First Amendment to the United States Constitution. The amendment substantially altered a unique program that benefited Maine families.

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[19] Persuasive literature exists to indicate that school choice programs not only provide a good education to students, but also that they are cost effective as well. *See, e.g.*, Brad P. Bender, Comment, *"Allegiance to Our Children": The School Choice Debate in the Commonwealth of Pennsylvania*, 104 DICK. L. REV. 165 (1999); Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON IND. L. REV. 7 (1993); Scott Fenton, Comment, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 CAP. U. L. REV. 645 (1997); Krista Kafer, Article, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439 (2003); James A. Peyser, Symposium: *Issues in Education Law and Policy-School Choice: When, Not If*, 35 B.C. L. REV. 619 (1994).

[*P68] In *Bagley v. Raymond School Department,* the plaintiffs challenged the constitutionality of section 2951(2). 1999 ME 60, ¶1, 728 A.2d 127, 130, *cert. denied,* 528 U.S. 947, 120 S. Ct. 364, 145 L. Ed. 2d 285 (1999). In rejecting that challenge, this Court concluded that the statute's explicit discrimination against parents who desire to send their children to private sectarian schools was justified because, as the State contended, the prohibition on the payment of tuition for religious-affiliated schools was compelled by the Establishment Clause of the United States Constitution. *Id.* ¶33, 728 A.2d at 138. This Court stated:

> [t]he State offers only one justification for the statute – an effort to comply with the Establishment Clause. Accordingly, it makes little difference whether we classify the level of scrutiny as strict or requiring only a rational basis. If the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny.

Id. ¶32, 728 A.2d at 137-38.

[*P69] Subsequent to this Court's decision in *Bagley,* however, the United States Supreme Court concluded that tuition payments by a municipality that enable families to send their children to sectarian schools do *not* violate the Establishment Clause of the United States Constitution as long as the statutory program pursuant to which the payment is made is neutral as to religion, and the choice of the religious school is the free and independent decision of the parents. *Zelman v. Simmons-Harris,* 536 U.S. 639, 652, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002). Because the language of section 5204(4) is neutral as to religion, and does provide parents with the choice of the school their

child will attend, it is abundantly clear from the decision in *Zelman* that the Establishment Clause does *not* require the prohibitory language of section 2951(2). *See Locke v. Davey,* 540 U.S. 712, 719, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (citing *Zelman,* 536 U.S. at 652).

[*P70] Relying on *Locke,* a United States Supreme Court case decided subsequent to *Zelman*, this Court concludes that, although it is clear that Maine *could* repeal section 2951(2) and again make section 5204(4) neutral as to religion, as it once was, and could reinstate tuition aid to parents who reside in towns without public schools and who choose to send their children to sectarian schools without violating the Establishment Clause, the elimination of the discriminatory provision of section 2951(2) is not required.

[*P71] Because this Court reads *Locke* as authorizing the explicit discrimination of section 2951(2), it applies a rational basis test to the equal protection claim of the plaintiffs, and accepts the State's argument that there is a rational basis to justify the unequal treatment of parents who desire to send their children to sectarian schools expressed in section 2951. Because, in my view, this Court reads *Locke* far more broadly than it should, and applies the wrong test to determine whether section 2951(2) violates the Equal Protection Clause, I respectfully dissent.

[*P72] The State of Washington maintains a post-secondary scholarship program for academically gifted students. The Supreme Court concluded in *Locke* that the State of Washington could refuse to provide scholarship funds pursuant to that scholarship program to students who were pursuing training for the ministry without

violating the Free Exercise Clause of the United States Constitution. *Locke,* 540 U.S. at 721, 725. In doing so, the Supreme Court stated that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19.

[*P73] The decision in *Locke* upheld the prohibition of scholarship aid in unique circumstances not applicable to the present appeal. The specific scholarship at issue in *Locke* was for the study of the ministry, referred to by the Supreme Court as "training for religious professions," and as a "distinct category of instruction." *Id.* at 721. Not all scholarship aid to sectarian schools was prohibited, and the Court noted that "[t]raining someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit." *Id.* The Court noted that in the State of Washington, there is a long history of opposition to the use of taxpayer funds to support the ministry and church leaders, and that the only interest at stake was the State's interest in not funding the training of clergy. *Id.* at 722 & n.5. The Supreme Court stated that it could not "conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect . . . [and that i]f any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

[*P74] Contrary to the training for church ministry that was at issue in *Locke,* for which the provision of scholarship aid the Supreme Court held could be prohibited, section 5204(4) provides tuition aid for primary and secondary education, education that is compulsory for all students in Maine, and in no way constitutes the "training for religious professions" that uniquely limited the Supreme Court's holding in *Locke.*

[*P75] Moreover, in the State of Washington, the prohibition on funding for education for the ministry is grounded in the State's Constitution. Maine has no such constitutional prohibition. Indeed, until the early 1980s and prior to the existence of section 2951(2), which was enacted to comply with the then current understanding of the Establishment Clause of the First Amendment, section 5204 allowed tuition payments to parents who chose to send their children to sectarian schools.[20] Although *Locke* states that there is some "play in the joints" between what is permitted by the Establishment Clause and what is required by the Free Exercise Clause of the United States Constitution, *Locke,* 540 U.S. at 718-19, the overt and broad discrimination in education mandated by section 2951(2) goes far beyond the limited restriction on funding for ministry training sanctioned by the Supreme Court in *Locke,* and constitutes more "play in the joints" than was recognized as legitimate in *Locke.* The prohibition on payment of tuition for sectarian secondary schools is not required by the Establishment Clause of the United States Constitution, and *Locke* should not be read as providing authority for the discriminatory language found in section 2951(2).

[*P76] In my view, section 2951(2) results in a denial of equal protection of the law pursuant to the Maine and Federal Constitutions. *See* U.S. CONST. amend. XIV, § 1; ME. CONST. art. 1, § 6-A. The disparate treatment mandated by section 2951(2) is based on religion, a most fundamental right, and requires that we apply the strict

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[20] *See* Frank Heller, *Lessons from Maine: Education Vouchers for Students Since 1873,* CATO INST. BRIEFING PAPERS (Cato Inst.), Sept. 10, 2001.

scrutiny standard to determine the legitimacy of the State's action. *Bagley,* 1999 ME 60, ¶27, 728 A.2d at 136-37. Strict scrutiny requires that the challenged action of the State be narrowly tailored to achieve a compelling governmental interest. *Id.* The compelling governmental interest that justified the enactment of section 2951(2), namely, that it was required to prevent section 5204(4) from violating the Establishment Clause, is no longer operative, and, accordingly, there is no longer any kind of compelling State interest that justifies the unequal treatment mandated by section 2951(2). Section 2951(2) can no longer withstand strict scrutiny analysis.

[*P77] Further, even if *Locke* is read more broadly than its language would seem to allow, and a rational relationship test is applied to the equal protection interests of the parents, there is no legitimate rationale that should be considered by the Court to justify the discrimination manifested in section 2951(2). The enactment of section 2951(2) was based solely on the conclusion that it was necessary to ensure compliance with the Establishment Clause. That was the *only* reason advanced by the State in *Bagley* to justify the discrimination in section 2951(2). *Bagley,* 1999 ME 60, ¶56, 728 A.2d at 144. The language of section 5204(4) making reference to the First Amendment remains unchanged. Because section 2951(2) is not required by the Establishment Clause, despite the fact that *Bagley* made clear the basis for the enactment of section 2951(2) and the issue on which the State relied in seeking to uphold section 2951(2), the State now advances, and the Court accepts, new, after-the-fact reasons to justify the discriminatory language of section 2951(2). Those reasons should be rejected.

[*P78] I agree that the State is not required to provide tuition aid to parents who wish to send their children to non-public schools. If it does provide such aid, however, it should not be able to exclude private schools that also happen to have a religious affiliation. In my view, that is blatant discrimination that reflects not a *neutrality* toward religion, but rather an animus *against* religion. As was said in *Bagley*, "[i]f the State's justification [for the disparate treatment] is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny." *Id.* ¶32, 728 A.2d at 138. The Establishment Clause is the only rationale that the State should be allowed to advance and that should be considered to justify the disparate treatment reflected in section 2951(2), and it does not.

[*P79] I would vacate the judgment of the Superior Court.

APPENDIX B

KEVIN & JULIA ANDERSON, et al., Plaintiffs v. STATE OF MAINE, DEPARTMENT OF EDUCATION, et al., Defendants.

CIVIL ACTION DOCKET NO. CV-02-480

SUPERIOR COURT OF MAINE, CUMBERLAND COUNTY

2004 Me. Super. LEXIS 206

September 30, 2004, Decided

COUNSEL: For State, Defendants: PAUL STERN AAG, DEPARTMENT OF THE ATTORNEY GENERAL, AUGUSTA, ME.

For McLU: ZACHARY HEIDEN ESQ, PORTLAND, ME.

For Intervenors: JEFFREY THALER ESQ, BERNSTEIN SHUR SAWYER & NELSON, PORTLAND, ME.

For Defendants: JEFFREY EDWARDS ESQ, PRETI FLAHERTY BELIVEAU PACHIOS & HALEY, PORTLAND, ME.

JUDGES: Robert E. Crowley, Justice.

OPINION BY: Robert E. Crowley

OPINION:

ORDER ON PLAINTIFFS', DEFENDANT'S, AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

In Maine, "every person within the age limits prescribed by the state statute shall be provided an opportunity to receive the benefit of a free public education." 20-A M.R.S.A. § 2(1). *See also* Me. Const., art. VIII, § 1 ("the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."). The control of the management of the public schools is generally vested in local school administrative units. ("SAUs"). In order to provide public education to students, a school administrative unit may either build its own high school for its students or contract with another SAU or private school that is approved for tuition purposes and that meets basic school approval criteria. *See* 20-A M.R.S.A. §§ 2701 & 5204(3). Alternatively, an SAU that has neither its own school nor a contract with another secondary school may pay tuition to a public school or a qualified private school. 20-A M.R.S.A. § 5204(4).

Prior to 1981, there existed no statutory distinction between secular and religious private schools in the Maine tuitioning statutes. *See* 20 M.R.S. § 1281 (1961). Consequently, parents in towns that lacked their own public schools were able to enroll their children in private religious schools and to receive tuition reimbursements in the same way that were parents who enrolled their children in private secular schools. In 1980, Attorney General Richard Cohen issued an opinion to the Legislature regarding the constitutionality of using State tuition funds to pay for attendance at private religious schools. *See* Op. Me. Att'y Gen. 80-2. In that Opinion, Attorney General Cohen "concluded that the inclusion of religious schools in Maine's tuition program violated the Establishment

Clause." *Bagley v. Raymond School Department*, 1999 ME 60, P5, 728 A.2d 127, 130-31 (citing Op. Me. Att'y Gen. 80-2). Subsequently, in the course of a recodification of the education title of the Maine Code, the Legislature added subsection 2 to the new 20-A M.R.S.A. § 2951, requiring that to be approved to receive tuition payments a school must be "nonsectarian in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2).

Although the legislative debates surrounding the recodification of the education title and the adoption of section 2951(2) make no mention of the impetus behind the new distinction,[1] it is generally understood that it was adopted in response to the Attorney General's Opinion and in an effort to bring Maine's tuition program into compliance with Establishment Clause jurisprudence as it existed at the time. *See Bagley*, 1999 ME 60, P5, 728 A.2d at 130-31.

In 2003, the Maine Legislature rejected a bill – Legislative Document 182 – "An Act to Eliminate Discrimination Against Parents Who Want to Send Their Children to Religious Private Schools" (L.D. 182") – that would have repealed section 2951(2). Excerpts of the debates that took place in the Legislature regarding L.D.

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[1] Indeed, the legislative debates are devoid of any mention of section 2951(2) specifically. Rather, the statute's legislative history includes several statements, made by members of the committee responsible for drafting the bill, that it "does not . . . contain any substantive changes whatsoever." 1 Legis Rec. 229 (1982). *See also* Revision of the Education Laws: Report of the Joint Standing Committee on Education 2 (April 1981).

182[2] include arguments regarding multiple governmental interests furthered by section 2951(2) and its exclusion of religious schools from Maine's tuition program. Those interests include the belief that: "publicly-funded education system works best when the education is one of diversity and assimilation;" that "government officials cannot, and should not, review the religious teachings of religious schools . . . without approving or disapproving of religion," and that "discrimination at religious schools is permissible but the State should not fund that discrimination."

The Plaintiffs

The Plaintiffs in this case are residents of Maine towns[3] that have not built their own public schools and whose SAU's have either contracted with other towns for the provision of public school services[4] or publicly fund their high school students' decisions to attend privately

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[2] In its opposition to Defendants' motions for summary judgment, the Plaintiff objects to these excerpts arguing that they are not relevant under M.R. Evid. 402. As discussed below, the court finds these excerpts to be relevant, admissible and helpful to the extent that they articulate legitimate government interests in excluding private religious schools from Maine's tuition program.

[3] The Anderson, Daniels, Rugan and Vanderwerf Plaintiffs are all residents of Durham; The Jerome Plaintiffs are residents of Raymond; and the Guay Plaintiffs are residents of Minot.

[4] The Town of Minot, along with the town of Mechanic Falls, has contracted with the Town of Poland for secondary school services for at least 90% of students in grades 9-12 from Minot and Mechanic Falls. (JSF P64). The Minot School Policy permits families to apply for approval to attend another high school "based upon education requirements that may not be offered in association with Poland Regional High School." (*Id.* P69).

operated secular schools. All of the Plaintiff parents, as well as their children, are members of either the Catholic,[5] Congregational,[6] or Seventh-day Adventist[7] religions. The Plaintiff children currently attend private sectarian schools, paid for by their parents. None of the Plaintiffs believe that their children must attend private sectarian schools as part of their religion.[8] Instead, the decision to send their children to religious schools is a discretionary and voluntary choice that each of the Plaintiff families have made. All but one of the Plaintiff families explicitly testified that regardless of whether they prevail in this lawsuit, they intend to continue sending their children to private religious schools. Plaintiffs have either specifically requested that their towns pay tuition to St. Dominic's,[9] Pine Tree or Union Springs[10] for their children to attend those schools and were denied by the towns or did not make such a request believing that the towns would deny the request.

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[5] The Guay, Jerome, Rugan, and Vanderwerf Plaintiffs are Catholic.

[6] The Daniels Plaintiffs are Congregationalist.

[7] The Anderson Plaintiffs are Seventh-day Adventist.

[8] Julia Anderson has testified that while her church does not require her to send her children to a Seventh-day Adventist School, nor does she believe that her children must go to Seventh-day Adventist schools as part of her religion, she does believe it violates tenets of her religion to send her children to a secular school because they were teaching things that she believed were detrimental to her children's moral character and spiritual life.

[9] The Guay, Jerome, Rugan, and Vanderwerf Plaintiffs have enrolled their children in St. Dominic's.

[10] The Anderson Plaintiffs have enrolled their children in Pine Tree Academy and Union Springs Academy.

The Schools

St. Dominic's is a private, pervasively sectarian Roman Catholic high school located in Lewiston, Maine operated under the authority and jurisdiction of the Roman Catholic Bishop of Portland. St. Dominic's "reserves the right to establish a priority for admission which will give a preference . . . to those students whose families are registered members of Catholic parishes." Welch Aff. Exh. 7 at I. The school's handbook provides that "participation in the religious classes and spiritual life of the High School is required of all students." *Id.* at IV. Further, any applicant for a teaching position at St. Dominic's must "mirror gospel values in relating to adults and students identified with the school," and "understand and accept the role of the school as a unique pastoral, educational agency of the church." *Id.* at 12.4.

Pine Tree Academy is a pervasively sectarian Seventh-day Adventist School. A child who attends Pine Tree Academy cannot avoid Seventh-day Adventist religious principles in education. The school's handbook states: "Any student in grades K-12 who expresses a desire for a Christian education and meets the criteria for admission is welcome to attend PTA." Krueger Aff. Exh. 1. The high school curriculum requires every student to take and pass a series of four courses on the Bible and Christian life. *Id.* Finally, the application for admission to the school asks whether and when the prospective student was baptized, requests the name and address of church membership of the student, asks for the church affiliation of the parents or guardians, and inquires whether the student has any learning disabilities. *Id.* at Exh. 2.

Union Springs Academy is a pervasively sectarian Seventh-day Adventist School located in Union Springs, New York. The school's handbook states: "students are expected to attend daily and weekend worship services." Jt. Exh. 110. The application for admission asks for church affiliation of the family and each student is required to sign a Student Contract which states: "I understand that Union Springs Academy is a Seventh-day Adventist Christian school and its objective is to help students develop a personal relationship with Jesus Christ while obtaining a high school education. If accepted as a student . . . I agree to refrain from activities that oppose this objective." *Id.* Students at Union Springs are required to take a series of four courses relating to Christ, the Bible and Seventh-day Adventist doctrines. *Id.*

DISCUSSION

This case is the latest iteration of a recurring effort to compel the State of Maine to allow towns to fund private, religious education. The plaintiffs have raised many of the same arguments that similarly situated plaintiffs raised in previous suits seeking a judicial determination that 20-A M.R.S.A. § 2951(2)'s prohibition of public funding for sectarian schools is unconstitutional. *See, e.g. Bagley*, 1999 ME 60, 728 A.2d 127; *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); and *Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892 (D. Me. 2003) (Kravchuck, Magistrate Judge), *aff'd*, 307 F. Supp. 2d 158 (D. Me. 2004). As the plaintiffs in *Bagley, Strout,* and *Eulitt* did, the Plaintiffs here allege that Maine's statutory preclusion of sectarian schools' eligibility for public tuition funds violates their rights under: (1) the Free Exercise Clause of the First Amendment; (2) the Establishment Clause of the

First Amendment; and (3) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[11]

The impetus behind this latest challenge to the statute is the recent U.S. Supreme Court decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) which, among other things, clarified Establishment Clause jurisprudence and held that, in some situations, states may fund private, religious schools without advancing or inhibiting religion. *Id.* at 643. Based upon *Zelman*, Plaintiffs argue here that previous decisions of the Law Court (in *Bagley*) and the First Circuit Court of Appeals (in *Strout*), which held that a tuition program that specifically excludes religious schools does not violate the Establishment Clause, are no longer good law and, as a result, Maine's statute should now be held unconstitutional. In addition, the Plaintiffs are seeking reimbursement from the State and their town school districts for tuition for the 2002-03 and 2003-04 school years as well as injunctive and declaratory relief ordering the State and the towns not to discriminate against them on the basis of religion in connection with future requests for tuition payments on their behalf.[12]

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[11] Plaintiffs' First Amended Complaint also alleged violations of the Speech Clause of the First Amendment. In their Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("PMSJ"), however, plaintiffs expressed their decision not to pursue that claim "in light of the U.S. Supreme Court's treatment of a similar claim in *Locke v. Davey*, 124 S. Ct. 1307, 1313 n.3 (2004)." PMSJ at 1, n.1

[12] The individual towns of Raymond, Minot and Durham as well as their respective school districts were originally named as defendants in this suit. In an Order dated May 14, 2003, however, this court found that because the town school districts were applying state law in

(Continued on following page)

Motions for Summary Judgment

Standard of Review

Summary judgment is proper where there is no genuine issue of material fact. *Rogers v. Jackson*, 2002 ME 140, P5, 804 A.2d 379, 380. In considering a motion for summary judgment, the court must "consider the evidence and reasonable inferences that may be drawn from the evidence in the light most favorable," to the non-moving party "in order to determine if the parties' statements of material facts and referenced record evidence reveal a genuine issue of material fact." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, P2, 845 A.2d 1178, 1179 (citing *Rogers*, 2002 ME 140, P5, 804 A.2d at 380). A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial. *Id.* (citing *Burdzel v. Sobus*, 2000 ME 84, P6, 750 A.2d 573, 575). At oral argument on the various motions for summary judgment currently before the court, each of the parties agreed that there exist no genuine issues of material fact and that summary judgment is appropriate in this case. Given, therefore, that there are no disputes over the relevant facts, the court will address each of the Plaintiffs' claims individually and grant summary judgment as to each claim.

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denying Plaintiffs tuition payments for their children's schooling, they could not be held liable under 42 U.S.C. § 1983. Consequently, this court granted the Towns' motions to dismiss pursuant to M.R. Civ. P. 12(b)(6). *See Anderson v. Town of Durham*, PORCV-02-480 (Me. Super. Ct., Cumb. Cty., May 14, 2003) (Crowley, J.).

Free Exercise

In extending their argument that Maine's statute effectively "excludes the option of choosing sectarian schools," and thus violates the Free Exercise Clause, Plaintiffs readily acknowledge that the operative law and relevant facts have not changed substantially since *Bagley* with respect to their Free Exercise Claim.

Plaintiffs' Free Exercise Clause claim fails simply by virtue of the fact that the law in this area is well settled and has remained unchanged since *Bagley* was decided on identical facts, notwithstanding the *Zelman* decision. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (*Hernanadez v. Commissioner*, 490 U.S. 680, 699 (1989)). In *Bagley,* the Law Court "could not find that any substantial burden has been imposed on the free exercise of [Plaintiffs' religious] beliefs," by Maine's tuitioning law. *Bagley*, 1999 ME 60, P18, 728 A.2d at 134.

Instead, the Law Court found that the law "merely operates so as to make the practice of [the individual's] religious beliefs more expensive," which is not enough of an inhibition to violate the Free Exercise Clause. *Id.* (quoting *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996)). According to the court, the law did "not prevent the parents from sending their sons to [a sectarian school],"[13] it

[13] Although this reasoning similarly applies to the instant case, it is worth noting, again, that none of the Plaintiffs here have asserted

(Continued on following page)

simply made their decision to do so more expensive than it might have otherwise been. Indeed, "while [the parents] will not receive tuition assistance if they choose to [send their children to sectarian schools], they are no more impaired in their efforts to seek a religious education for their sons than are parents of children in school districts that provide only a free nonreligious education in public schools." *Bagley*, 1999 ME 60, P18, 728 A.2d at 134.

Consistent with Free Exercise jurisprudence as it existed at the time and as it exists now, the Law Court in *Bagley* held that section 2951(2) does not place a substantial burden on the free exercise of religion and that "the exclusion of religious schools from the tuition program does not violate the Free Exercise Clause of the First Amendment." *Id.* P20, 728 A.2d at 134. This reasoning was echoed by the Court of Appeals for the First Circuit in *Strout,* where that court similarly found that the same Maine statute "does not prevent attendance at religious schools," nor does it burden the free exercise of religion given that "no parent makes the claim that attendance at a religious school is a central tenet or practice of their faith." *Id.* Finally, the U.S. Supreme Court in *Locke v. Davey*, 124 S. Ct. 1307 (2004) recently reversed a judgment of the Ninth Circuit that held that a similar prohibition in Washington State violated the Free Exercise Clause.

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that sending their children to religious schools amounts to "practicing" religion or comprises a central tenet of their respective faiths.

The Establishment Clause

As with their argument regarding the Free Exercise Clause, the plaintiffs in this case readily acknowledge that little has changed in either the facts or the applicable law since *Bagley* to justify a different result with respect to their Establishment Clause claim. Therefore, Plaintiffs have raised it primarily to preserve the issue for appeal. To the extent that they do articulate the basis for their Establishment Clause claim, however, Plaintiffs' argue that Maine's statute effectively creates a regime of non-religion rather than a regime of religious neutrality, and therefore violates the Establishment Clause. The Defendants argue again that, as with the Free Exercise argument, Establishment Clause jurisprudence has not changed since *Bagley* in any way that would compel a different outcome in this case.

In *Bagley,* the Law Court explained that "the Establishment Clause prohibits government from supporting or advancing religion and from forcing religion, even in subtle ways, on those who choose not to accept it." *Bagley*, 1999 ME 60, P22, 728 A.2d at 135. That Clause has no role, however, "in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." *Id.* P22, 728 A.2d at 136. Accordingly, the Law Court found "no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools." *Id.*

The Law Court's interpretation of the Establishment Clause and its holding in *Bagley* are consistent with the jurisprudence of the Court of Appeals for the First Circuit and of the U.S. Supreme Court. In *Strout,* the Court of

Appeals rejected the argument that Maine's statute demonstrates an impermissible hostility to religion. *Strout*, 178 F.3d at 64. Indeed, that court was "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery." *Id.* According to the court, "the Establishment Clause forbids the making of a law respecting the establishment of any religion. There is no relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure" state funding. *Id.*

Finally, in *Locke,* the U.S. Supreme Court held that the State of Washington's decision not to fund religious education was not sufficiently hostile to religion to violate the Establishment Clause. *Locke*, 124 S. Ct. at 1315 n.10. Notwithstanding the *Zelman* decision, which held that states *may* fund private religious education, there is no binding authority that stands for the proposition that a state *must* fund private religious education in order to avoid running afoul of the Establishment Clause. *See, Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892, ** 10-11 (D. Me. 2003) (Kravchuck, Magistrate Judge).

The Equal Protection Clause

Standing

As an initial matter, the State asserts that the Plaintiffs lack standing to pursue an equal protection claim. The State contends that if any disparate treatment has resulted from Maine's statute, it is the religious schools themselves that have been discriminated *against and not the parents. Therefore, according to the State, any claims arising under* the Equal Protection Clause are those for

the schools to make, not the parents. Because the parents have not demonstrated that the schools are unable to assert their own rights, the State argues that the plaintiffs lack standing to vindicate the schools' rights. Plaintiffs maintain that because it is the students and their families who are the primary beneficiaries under Maine's tuitioning system and because the schools are merely recipients of indirect, incidental benefits, it is the plaintiffs who have been most affected by the tuitioning system and who have standing to bring an equal protection claim.

Although logistically speaking there is a difference between Maine's program and the Ohio program at issue in *Zelman*,[14] Plaintiffs are correct that it is the choices of parents that are being funded and that are at issue here rather than the interests of the religious schools. Despite the fact that Maine's tuitioning practices, as they relate to funding tuition at private secular schools, involve direct payments from the SAU's to the private schools, this fact does not necessitate a conclusion that the plaintiffs lack standing. While it may be true that the schools are in a better position to argue disparate treatment, it is equally true that any tuition monies paid by a school district are contingent on the individual choice of parents to enroll

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[14] The Ohio statute, in relevant part, reads:

> Each scholarship to be used for payments to a registered private school is payable to the parents of the student entitled to the scholarship. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

Ohio Rev. Code Ann. § 3313.979 (Anderson 1999 and Supp. 2003). Maine's program, however, provides for payments to be made directly to either a public or a private school. *See* 20-A M.R.S.A. §§ 5204 & 5810.

their children in a particular school. The plaintiffs are essentially precluded from receiving a government benefit based on their having made a religiously motivated decision. Plaintiffs here are primarily claiming constitutional protection of the educational decisions they have made on behalf of their children and they therefore have standing. *Cf. Bagley*, 1999 ME 60, PP25-26, 728 A.2d at 136 ("We will assess the parents' Equal Protection argument assuming *arguendo* that the parents' lack of opportunity to have the State pay the tuition for the children to attend a private religious school results in their own disparate treatment on the basis of their religion.") *Id.* P26, 728 A.2d at 136.

Analysis

The plaintiffs' claim that Maine's tuitioning law violates the Equal Protection Clause is the claim upon which they have focused most of their efforts. The plaintiffs argue, as did the plaintiffs in *Bagley*, that section 2951(2) violates the Equal Protection clause by excluding sectarian schools from the category of schools to which parents in tuitioning towns can send their children using public funds. In support of their argument that Maine's statute is unconstitutional, the plaintiffs point to dicta in the *Bagley* opinion in which the Law Court noted that "if the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny," and the statute "must be struck down because the State offers no other reason for its existence." *Bagley*, 1999 ME 60, PP32-33, 728 A.2d at 138. Based on this statement in *Bagley* and the subsequent decision rendered by the U.S. Supreme Court in *Zelman* that a state may fund private religious schools

without running afoul of the Establishment Clause, the plaintiffs contend that the State's justification for the Maine statute's exclusion fails and section 2951(2) must now be struck down as unconstitutional.

Defendants, on the other hand, contend that Plaintiffs have failed to prove the disparate treatment necessary to trigger an Equal Protection analysis. They argue that because Plaintiffs can obtain a free secular education just as anyone in the State can there is no disparate treatment. This argument must fail given that the *Bagley* court found, on similar facts, that the statute does indeed create a distinction based on religion. 1999 ME 60, PP29-30, 728 A.2d at 137. In that case, the Law Court found that section 2951(2) "explicitly excludes only those private schools with religious affiliations." As such, the statute effectuates an "obvious disparate treatment of religious schools," under the statute, thereby triggering Equal Protection analysis. *Id.* The statute similarly effectuates disparate treatment of parents' educational choices in towns that do not operate their own school systems.

Under traditional Equal Protection analysis, distinctions based on suspect classifications such as race and religion are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). Notwithstanding this precept, however, Defendants argue that rational basis is the proper standard under which section 2951(2) should be scrutinized. Defendants first point to footnote three in the *Locke* decision in which the U.S. Supreme Court noted that where a statute has been found to be in accordance with the Free Exercise Clause, rational basis is the appropriate level of scrutiny for Equal Protection purposes. *See,*

Locke v. Davey, 124 S. Ct. 1307, 1313 n. 3 (2004). In addition, Defendants argue that public education is a governmental function so vital that even if the government, in carrying out that function, impacts a suspect classification, state action is subject only to rational basis scrutiny. State Def. Mot. Summ. J. at 25-26 (citing *Blount v. Dep't of Education & Cultural Services*, 551 A.2d 1377, 1381-82 (Me. 1988); and *Ambach v. Norwick*, 441 U.S. 68 (1979)).

Because it is not necessary, for the reasons stated *infra,* for the court to decide which level of scrutiny is proper in this case, the court will not address Defendants' arguments in favor of rational basis at length. Instead, the court finds that regardless of the proper level of scrutiny, and despite the fact that *Zelman* rendered faulty the justifications for the statute offered in *Bagley, Zelman* has not rendered the *Bagley* decision inapt nor has it rendered section 2951(2) unconstitutional.

In both *Bagley* and *Strout,* the State argued and those Maine courts found that the statute was adopted in an effort to bring Maine's tuition program into compliance with the Establishment Clause. Unlike *Bagley,* however, the State in this case has offered several reasons for the distinction created by the statute. While it may be true that, post *Zelman,* the State's argument that the statute is constitutional would fail if it offered no other reason for the statute's existence than compliance with the Establishment Clause, the State in this case has offered several other justifications for the statute, at least one of which is compelling enough to withstand both rational and strict scrutiny.

The plaintiffs argue that the justifications for the statute offered by the State in this case, stemming as they do from the legislative debates in 2003 over L.D. 182, cannot be considered by the court because there is no indication that they were contemplated by the Legislature when it originally enacted section 2951(2). Citing *Weinberger v. Wiesenfelder*, 420 U.S. 636, 648 n.16 (1975), Plaintiffs contend that when the actual justification for a statute is known, hypothetical justifications that were not considered by the legislature are not to be considered by the courts. Finally, plaintiffs argue that the debates surrounding L.D. 182, which took place twenty-two years after section 2951(2) was enacted, are not reliable sources from which to glean the legislative intent which led to the original enactment of the statute and should therefore not be considered by this court.

Although the court recognizes that "unsuccessful attempts at legislation are [often] not the best of guides to legislative intent," there are in fact circumstances where legislative "nonaction is significant" and may be considered by a court seeking to discern intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). In situations where, as here, the Legislature has not simply declined to act or passively acquiesced in shifts in statutory application but has, instead, taken affirmative steps to reaffirm a statute's function and to articulate informed, purposeful reasons for doing so, a court should not discount such clear indicators of legislative intent. *See id.* Further, while it may be true that courts, when faced with an explicit and singular justification for the statute, are appropriately hesitant to afford much deference to

hypothetical justifications or justifications offered after the original enactment,[15] that is not the situation here. Nowhere in the legislative history of section 2951(2) does it say that "compliance with the Establishment Clause" was the sole reason for the distinction between secular and private schools contained in the recodification of the education laws. Rather, compliance with the Establishment Clause and with the Attorney General's 1980 Opinion was the justification most readily suggested by the sequence of events leading up to the drafting of section 2951(2) and the sole justification presented by the State in defense of the statute when it was challenged in *Bagley* and its counterparts. Further, neither those cases, nor the 1981 and 2003 legislative debates, definitively established a singular, exclusive legislative intent. Given, therefore, that in 2003, when faced with the U.S. Supreme Court decision in *Zelman*, and the resulting challenge to Maine's statute, the Legislature reexamined section 2951(2), engaged in an informed debate over its continued necessity and validity, and ultimately determined that the statute accurately reflected the will and the interests of the people of this State in a manner consistent with the Constitution, those justifications are relevant and important and this court will consider them. *See Bob Jones University v. United States*, 461 U.S. at 601.

As justification for excluding private religious schools from Maine's tuition program, the State advances the following rationales:

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[15] *See Weinberger v. Wiesenfelder*, 420 U.S. 636, 648 n.16 (1975) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973).

> (1) A publicly funded education system works best when that education is one of diversity and assimilation, and not a separate and sectarian one.
>
> (2) Public funds should pay for religiously neutral rather than a religious education.
>
> (3) The State cannot reasonably oversee all aspects of a sectarian school's curriculum because to do so would result in religious entanglements.
>
> (4) Religious schools can, and reserve the right to, discriminate in favor of their own religion, and this state should not fund discrimination.
>
> (5) There exists no exigency as in *Zelman* that would reasonably require the State to depend upon sectarian schools to help provide all Maine children with a free public education.

Def. Mot. Summ. J at 28-29 (quoting *Eulitt*, 2003 U.S. Dist. LEXIS 13892, at **8-9).

The first rationale given by the State in this case is diversity in public education. The argument that the sectarian schools in which the plaintiffs have enrolled their children practice some measure of discrimination based upon religion and that that discrimination results in less diverse student bodies and teaching curricula than those seen in Maine's public schools is borne out by the facts in this case. *See supra* at 4-5. The private religious schools unequivocally espouse sectarian principles in their teaching methods and in their admission policies by requiring students to take Bible study courses and by preferring members of their respective religions for admission. *Id.*

These practices have facilitated the schools' enrollment of students with largely homogeneous religious beliefs.[16] While it is permissible for religious schools to enroll students who possess similar, if not identical religious beliefs, the Maine Legislature, operating under its mandate to represent the people of Maine, has indicated that a more diverse student community and curriculum is preferable. In rejecting L.D. 182 in 2003, the legislature rejected an opportunity to change the tuition program and provide public funding to private sectarian schools that discriminate on the basis of religion. As noted by Magistrate Judge Kravchuck in her recommendation in *Eulitt,* school funding issues "are best left to legislative determination, so long as they meet constitutional requirements." *Eulitt v. Maine Department of Education*, 2003 U.S. Dist. LEXIS 13892, *8 (D. Me. 2003).

The argument that encouraging and protecting diversity is a compelling government interest, capable of withstanding strict scrutiny, is well established in Equal Protection jurisprudence. The U.S. Supreme Court recently reconfirmed that student body diversity is a compelling state interest and the benefits of diversity are substantial. *Grutter v. Bollinger*, 539 U.S. 306, 327-28 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003)). Because the court can point to recent and authoritative legal precedent in making a determination that at least one of the State's justifications for section 2951(2) withstands strict scrutiny, it is unnecessary for the court to

[16] The student body at St. Dominic's is approximately 75 percent Catholic while the student body at Pine Tree Academy is approximately 75-85 percent Seventh-day Adventist. Joint Stipulation of Facts at PP107 & 114.

decide whether the validity of the justification offered in *Bagley* has survived *Zelman*. Rather, it is enough for this court to find, as it does, that the justification for 2951(2)'s religiously-based distinction is compelling and that it withstands strict scrutiny. As such, Maine's tuition program is constitutionally sound.[17]

The entry is

Plaintiffs' Motion for Summary Judgment is DENIED.

Defendants' Motions for Summary Judgment are GRANTED.

Dated at Portland, Maine this 30th day of September, 2004

Robert E. Crowley

Justice, Superior Court

[17] The court notes that it has not explicitly addressed or decided whether the statute meets the "narrowly tailored" prong of the strict scrutiny analysis should strict scrutiny apply. This is largely a function of the fact that the parties have not presented arguments on the issue. In addition, and notwithstanding *Zelman*, "while it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children," the court is not convinced that it could do so "without addressing significant problems of entanglement," and while still advancing the objectives of the Legislature and the people of this state. *Bagley*, 1999 ME 127, P71, 728 A.2d at 147.

APPENDIX C

Maine Const., Art. VIII § 1. Legislature shall require towns to support public schools; duty of Legislature

Section 1. A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State; provided, that no donation, grant or endowment shall at any time be made by the Legislature to any literary institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to alter, limit or restrain any of the powers vested in any such literary institution, as shall be judged necessary to promote the best interests thereof.

APPENDIX D

20-A M.R.S. § 2951 (2005)

§ 2951. Approval for tuition purposes

A private school may be approved for the receipt of public funds for tuition purposes only if it:

1. BASIC APPROVAL. Meets the requirements for basic school approval under subchapter I;

2. NONSECTARIAN. Is a nonsectarian school in accordance with the *First Amendment of the United States Constitution*;

3. INCORPORATED. Is incorporated under the laws of the State of Maine or of the United States;

4. REPEALED. Laws 1983, c. 859, § A, 8.

5. ADDITIONAL REQUIREMENTS. Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. STUDENT ASSESSMENT. Any school that enrolls 60% or more publicly funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of students; and

7. RELEASE OF STUDENT RECORDS. Upon the request of a school unit, release copies of all student records for students transferring from the private school to the school unit.

20-A M.R.S.A. § 5204(4) Secondary students right to attend school in another administrative unit

The following provisions govern the right of secondary students to attend school in another school administrative unit other than the one in which they are resident.

* * *

4. NO SECONDARY SCHOOL. Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in chapter 219.

APPENDIX E

[LOGO]

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006
[Names And Addresses Omitted In Printing]

July 12, 2002

J. Duke Albanese, Commissioner
Department of Education
23 State House Station
Augusta, Maine 04333-0023

Dear Commissioner Albanese:

You have inquired regarding the continuing vitality of 20-A M.R.S.A. § 2951(2) in light of the decision of the Supreme Court of the United States on June 27, 2002, in *Zelman v. Simmons-Harris,* No. 00-1751 (U.S. June 27, 2002). Section 2951(2) excludes sectarian schools from participation in Maine's state-wide, publicly-funded education plan. In particular, that provision renders ineligible sectarian schools from receipt of public tuition payments. Maine's plan has been upheld recently by both the U.S. Court of Appeals for the First Circuit and Maine's Law Court. *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied* 528 U.S. 931 (1999); *Bagley v. Raymond School Department,* 1999 ME 60, 728 A.2d 127, *cert. denied* 528 U.S. 947 (1999)

The Supreme Court in *Zelman* upheld an Ohio education plan which allowed parents in the failed Cleveland public school system to choose between a variety of options for education of their children, including the payment of

public funds by means of "vouchers" to sectarian schools. As is obvious from both the decision and commentary which has followed, *Zelman* represents a further evolution in Establishment Clause jurisprudence. That being said, *Zelman* dealt with a statute which *allowed a* state to use vouchers. The issue presented by any challenge to Maine's law is fundamentally different: whether Maine is *required* to fund sectarian education. That issue has not been decided by the Supreme Court. There are a number of other significant differences between the Ohio public education plan before the Court in *Zelman* and that of Maine including, *inter alia*, the structure of the school system, the structure of the tuition program, the options available and the level of payments.

Since *Zelman* did not address in particular the issue presented by Maine's law, until the Legislature or a court mandates otherwise, it remains the responsibility of the Department of Education and school administrative units across the State to continue to abide by section 2951(2).

If we can provide further assistance, please call on us.

Sincerely,

/s/ G. Steven Rowe
G. Steven Rowe
Attorney General

APPENDIX F

[LOGO]

STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

[Names Omitted In Printing]

January 7, 1980

Honorable Howard M. Trotzky
Maine State Senate
State House
Augusta, Maine 04333

Dear Senator Trotzky:

This will respond to your request for an opinion on the following question:

> "Does L.D. 691, Chapter 431, Public Law 1979, violate the First Amendment of the U.S. Constitution inasmuch as it allows individuals in school administrative districts to attend privately operated religious schools at public expense?"

Your question raises a broader issue, namely, whether public funds may be used to pay the tuition of children attending religiously operated elementary and secondary schools. In order to properly respond to your question, it is necessary to set out the pertinent statutory provisions in some detail.

The Statutory Framework

At the present time there are several statutes which authorize school officials, in appropriate circumstances, to pay the tuition of students who attend privately operated elementary and secondary schools. Section 1 of Chapter 431 of the Public Laws of 1979 enacted a new section 213-A to Title 20 of the Maine Revised Statutes which mandates that each school administrative district maintain both an elementary and a secondary school for its pupils. 20 M.R.S.A. §213-A (2)(D) (1965-1979 Supp.) provides, however, that

> " . . . a district may meet the requirement of providing a secondary school facility by contracting . . . with a private academy for all or part of its pupils for a term of from 2 years to 10 years."

20 M.R.S.A. §912 (1965-1979 Supp.) authorizes each school administrative unit to contract with another administrative unit for elementary school privileges. In the event that an administrative unit does not maintain an elementary school and does not contract for elementary school privileges, it "may pay tuition for any student who resides with a parent or legal guardian in that administrative unit and who attends an approved elementary school." 20 M.R.S.A. §912 (1965 – 1979 Supp.).

Section 1289 of Title 20, as amended by P.L. 1979, c. 431, §4, permits any administrative unit which does not maintain a secondary school to authorize its local school committee to enter into contracts with the trustees of an approved private academy for secular educational services. Any contract entered into pursuant to 20 M.R.S.A. §1289 may run from one to five years. Section 1289 further provides that in those instances where an administrative unit

has entered into a contract with a private academy, a joint committee may be established consisting of "a mutually agreed upon number of members of the school committee or board of directors of each contracting administrative unit chosen from their own membership and an equal number of trustees of the academy." The responsibilities and powers of the joint committee are set out in 20 M.R.S.A. §1289 (1965-1979 Supp.) and include the authority to select and employ the teachers at the academy, to fix their salaries, to arrange the course of study and "to supervise the instruction and to formulate and enforce proper regulations pertaining to other educational activities of the school." Finally, with respect to the financial arrangements pertaining to a contract made pursuant to 20 M.R.S.A. §1289, the tuition liability of the contracting administrative unit is the same as if the unit maintained an approved secondary school.

In the event that an administrative unit does not maintain an approved secondary school and does not contract for secondary school privileges, a student who resides within the unit "may attend any approved secondary school to which he may gain admission. 20 M.R.S.A. §1291 (1965-1979 Supp.) *as amended* by P.L. 1979, c. 431, §5. Additionally, 20 M.R.S.A. §1291 permits a student to attend "some other approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign language course, where the secondary school within his administrative unit does not offer a sufficient number of those courses.[1]

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[1] 20 M.R.S.A. §1291 (1965-1979 Supp). provides in pertinent part:

"Any youth whose parent or legal guardian maintains a home for his family in an administrative unit that maintains, or contracts for school privileges in, an approved secondary school which offers less

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Finally, 20 M.R.S.A. §1454 provides that "[a]ny youth whose parent or legal guardian maintains a home for his family in the unorganized territory of this State and who may be judged by the commissioner qualified to enter an approved secondary school may attend any such school in the State to which he may gain entrance. . . ."

To summarize the statutory provisions in question, 20 M.R.S.A. §213-A (1955-1979 Supp.) permits a school administrative district, which does not maintain a secondary school facility, to contract with a private academy to provide secondary school privileges for its pupils. 20 M.R.S.A. §912 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved elementary school and does not contract with another unit for such services, to pay a student's tuition for attendance at "an approved elementary school." 20 M.R.S.A. §1289 (1965-1979 Supp.) authorizes a school administrative unit, which does not maintain an approved secondary school, to contract with a private academy to provide for the schooling of all or some of its pupils. 20 M.R.S.A. §1291 (1965-1979

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than 2 approved occupational courses of study, and who has met the qualifications for admission to the high school in his town, may elect to attend some other approved secondary school to which he may gain admission for the purpose of studying an occupational course not offered or contracted for by the administrative unit of his legal residence. Any youth whose, parent or legal guardian maintains a home for his family in an administrative unit that maintains, or contracts for school privileges in, an approved secondary school, and who has met the qualifications for admission to the high school in his unit, may elect to attend some other approved secondary school in the State to which he may gain admission for the purpose of studying or of completing at least a 2-year course in mathematics or science when such courses are not offered or contracted for by the administrative unit of his legal residence or a foreign language when the unit where he resides offers less than 2 approved foreign language courses, . . ."

Supp.) permits a student to attend any approved secondary school to which he may gain admission in the event that his school administrative unit does not support, maintain or contract for secondary schooling for its pupils. Additionally, 20 M.R.S.A. §1291 permits a student, in appropriate circumstances, to attend an approved secondary school to which he may gain admission for the purpose of studying an occupational course, a mathematics or science course or a foreign language course. Finally, 20 M.R.S.A. §1454 (1965-1979 Supp.) permits, in certain circumstances, a student from the unorganized territory to attend an approved secondary school, to which he may gain admission, at State expense.

Before addressing your specific question regarding the, constitutional issue, it is necessary to determine whether the statutory provisions referred to above apply to religiously operated elementary and secondary schools or whether the statutory authority of school administrative districts and units to enter into contracts with and pay the tuition of students at non-public schools is limited to private non-religious elementary and secondary schools.

It is a well-established principle that the courts will avoid addressing questions raising constitutional issues unless it is impossible to do so. *See, e.g., Johnson v. Maine Wetlands Control Board*, Me., 250 A.2d 825, 827 (1969); *State v. Good*, Me., 308 A.2d 576, 579 (1973); *Morris v. Goss*, 147 Me. 87, 93, 83 A.2d 556 (1951). While the judiciary has both the duty and the power to invalidate unconstitutional legislation, *State v. Butler*, 105 Me. 91, 73 A.560 (1909), it has an equally important responsibility to exercise that power with caution and "only when there are no rational doubts which may be resolved in favor of the constitutionality of the statute. . . ." *Crommett v. City of*

Portland, 150 Me. 217, 231, 107 A.2d 841 (1954) *quoting State v. Vahlsing*, 147 Me. 417, 430, 88 A.2d 144 (1952). As stated by former Chief Justice Dufresne, "[t]he cardinal principle of statutory construction is to save, not to destroy." *State v. Davenport*, Me., 326 A.2d 1, 6 (1974).

With respect to any legislative enactment, there is a strong presumption of constitutionality. *State v. S.S. Kresge, Inc.*, Me., 364 A.2d 868, 872 (1976). In construing legislation, the duty of the court is to determine whether the provisions of the statute "are susceptible of a reasonable interpretation which would satisfy constitutional requirements." *Portland Pipe Line Corp. v. Environmental Improvement Commission*, Me., 307 A.2d 1, 15 (1973), *app. dismissed*, 414 U.S. 1035 (1973). If at all possible a statute should be construed, in a reasonable manner, so as to, avoid rendering it unconstitutional. *State v. Fitanides*, Me., 373 A.2d 915, 920-21 (1977). Where a statute is reasonably susceptible of two interpretations, the court is bound to adopt that interpretation which sustains the statute's constitutionality. *See Portland Pipe Line Corp. v. Environment Improvement Commission, supra; In re Stubbs*, 141 Me. 143, 147, 39 A.2d 853 (1944).

With respect to sections 213-A, 912, 1289, 1291 and 1454 of Title 20, the statutes are all silent as to whether school administrative units and districts are authorized to pay the tuition of students attending religiously operated elementary and secondary schools. Each statute in question authorizes, in appropriate cases, either a school administrative unit or district to enter into contracts with and pay the tuition for students at privately operated elementary and secondary schools. One interpretation of these statutes is that administrative units and districts may contract with any private elementary or secondary

school, including religiously operated ones. On the other hand, an equally reasonable interpretation of these statutory provisions is that the authority of administrative units and districts to enter into such contracts is limited to private, non-sectarian elementary and secondary schools.

In view of the doctrine that statutes should be construed, if reasonably possible, so as to avoid rendering them unconstitutional, it is now necessary to consider whether the practice of using public funds to pay tuition for students attending religiously operated elementary and secondary schools is constitutionally permissible.[2]

The Establishment Clause

The First Amendment to the United States Constitution[3] provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Article I, §3 of the Maine Constitution contains a similar prohibition.[4]

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[2] It is our understanding that as of October 1, 1979, 46 pupils were attending religiously operated elementary schools and 289 pupils were attending religiously operated secondary schools at public expense pursuant to 20 M.R.S.A. §§213-A, 912, 1289, 1291 or 1454 (1965-1979 Supp.).

[3] The provisions of the First Amendment have been made binding on the states through the Fourteenth Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 106, (1943).

[4] Article I, §3, Me. Const., provides:

> "All men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences, and

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Any analysis of the First Amendment's "Establishment Clause" and its interrelationship with state attempts to provide public aid, either directly or indirectly, to religiously operated schools, must necessarily begin with the United States Supreme Court decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). In *Everson*, the Court upheld a New Jersey statute authorizing reimbursement to parents for the costs of transporting their children to school. The statute also permitted reimbursement for transportation expenses to parents whose children attended parochial schools. In arriving at its decision, the Court recognized the inherent tension between the "Establishment Clause" and the "Free Exercise Clause" of the First Amendment. As stated by the Court:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and

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no one shall be hurt, molested or restrained, in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; – and all persons demeaning themselves peaceably, as goodmembers of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

The Maine Law Court has held that the prohibitions in Article I, §3 are "no more stringent" than those embodied in the First and Fourteenth Amendments to the United States Constitution. *Squires v. City of Augusta*, 155 Me. 141, 164, 153 A.2d 80, 88 (1959).

> faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."

Id. at 16.

Acknowledging that the "establishment clause" was intended to erect "'A wall of separation between church and State,'" the Court concluded that providing bus transportation to *all* children, including those attending religious schools, did not offend any constitutional principle embodied in the First Amendment. *Id.* at 16 *quoting Reynolds v. United States*, 98 U.S. 145, 164. In essence, the Court concluded that providing transportation to all school children did not have either the purpose or effect of promoting or establishing religion.[5]

In *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) the Supreme Court attempted to formulate a general rule regarding establishment clause cases.[6] The Court stated:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose

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[5] The constitutionality of using public money to provide transportation to children attending religious schools was recently reaffirmed in *Cromwell Property Owners Association v. Toffolon*, ___F.Supp. ___, (D.Conn., Docket No.Civil H-78-475, Filed August 31, 1979).

[6] *Abington School District v. Schempp, supra* involved Bible reading in public schools. *See also Engel v. Vitale*, 370 U.S. [. . .]

> and a primary effect that neither advances nor inhibits religion."

Applying the test announced in *Schempp*, the Court in *Board of Education v. Allen*, 392 U.S. 238 (1967) upheld a New York statute authorizing the loan of approved secular textbooks to all school children, including those attending parochial schools. While the Court recognized that textbooks are significantly different from school buses, the Court also noted that "each book loaned must be approved by the public school authorities; only secular books may receive approval." 392 U.S. at 244-45.

In its landmark decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (hereinafter referred to as *Lemon I*), the United States Supreme Court added a third and possibly a fourth criterion to the "purpose and effect" test it had adopted and followed in *Schempp* and *Allen*. In *Lemon I*, the Court held that in order for a statute to survive a challenge that it is unconstitutional because it authorizes state aid to religiously affiliated schools, not only must it have a secular legislative purpose and a primary or principal effect which neither advances nor inhibits religion, it must also not foster an excessive governmental entanglement with religion. Additionally, the Court suggested that issues involving the use of public money to aid religious schools carry the potential for political divisiveness in local communities. This danger of political divisiveness, the Court added, is at odds with the fundamental principle that church and State remain separate.

The analysis formulated in *Lemon I* has been utilized by the Court in all of the subsequent cases raising establishment clause challenges. In evaluating a challenged statute, it should be emphasized that the First and Fourteenth

Amendments prohibit laws "'respecting an establishment of religion' even though its consequence is not to promote a 'state religion.'" *Committee For Public Education v. Nyquist*, 413 U.S. 756, 771 (1972). On the other hand, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone constitutionally invalid." *Id.*

An examination of each of the tests articulated in *Lemon I* follows.

The "Purpose" Test

The "purpose" test enunciated by the United States Supreme Court is perhaps the easiest to apply. Pursuant to this standard, the Court attempts to ascertain the purpose which the legislative enactment was designed to achieve. In most cases involving state aid to religious schools, it is clear, one way or the other, what purpose the statute was intended to serve. In the most recent cases the Court has had no need to use the "purpose" test since it has been clear that a particular statute had a secular purpose, i.e., providing for the education of all school children. However, in some relatively early decisions the Court did strike down state statutes because their purposes were to promote religious activity. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1969) (statute prohibiting the teaching in public schools of the theory of evolution); *Engle v. Vitale*, 370 U.S. 421 (1962) (statute requiring prayer reading in public schools); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (statute requiring Bible reading in public schools); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (statute authorizing "release time" from public education for religious instruction in

public school buildings). *Compare Zorach v. Clauson*, 343 U.S. 306 (1952) in which the Court upheld the constitutionality of a statute authorizing "release time" from public education for religious instruction off public school premises.

It is fair to say that with respect to cases involving public aid, in varying forms, to religious educational institutions, the Court has rarely used the "purpose" test to invalidate a state statute.

The "Primary or Principal Effect" Test

The "primary effect" test formulated by the United States Supreme Court to evaluate statutes claimed to be violative of the Establishment Clause is, perhaps, the most difficult test to understand and apply. In many cases, its contours overlap with those of the "entanglement" test. Nevertheless, it is fair to say that those cases which have discussed and applied the "primary effect" test have emphasized a common element. That element is that the educational institutions receiving public aid were pervasively religious, such that it would be impossible to identify public aid as being used for purely secular purposes. The pervasively religious atmosphere at such institutions has led the Court to conclude that public aid for purely secular functions cannot be distinguished from the sectarian function performed by the religious institution and therefore has a primary effect of aiding and/or promoting that religious atmosphere. A few examples may clarify the "primary effect" rationale.

In *Hunt v. McNair*, 413 U.S. 734 (1973) the Court considered a South Carolina statute which was designed to assist higher education institutions in constructing,

financing and re-financing building projects through revenue bonds. The law was designed to benefit all institutions of higher education, including those operated by religious groups. The advantage of the statute was that the college or university would borrow money at low interest and would not have to pay income tax on that interest. The law was challenged on First Amendment grounds when a Baptist College attempted to apply for benefits under it. In speaking of the "primary effect" test, the Court observed:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."

Id. at 743.

In *Hunt*, the Court found no evidence that the college was pervasively religious and therefore held that the law, as applied in this case, did not have a primary effect of advancing religion.

Similar results were reached in *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976) and *Tilton v. Richardson*, 403 U.S. 672 (1970). In *Roemer*, a state statute authorized the payment of public funds to "any private institution of higher learning within the State of Maryland." The act specifically provided that the funds could not be used for sectarian purposes and an auditing procedure was established to ensure that this provision of the act was not violated. Moreover, funds were not available to institutions which awarded only "seminarian or

theological" degrees. In rejecting a claim that the primary effect of the law advanced religion, the Court noted that while the religiously operated colleges had some aspects of sectarian influence, they were not pervasively sectarian. The Court was not persuaded that the institutions in question were so permeated with religion that their sectarian aspects could not be separated from their secular functions.

Similarly, in *Tilton* the Court upheld the constitutionality of Title I of the Higher Education Facilities Act of 1963 (20 U.S.C. §§711-721). This Act provided federal grants for the construction of buildings and facilities used exclusively for secular educational purposes. The Act was challenged when several catholic colleges applied for construction grants. The Court rejected the "primary effect" argument "that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680.

On the other hand, there are several cases in which the Supreme Court has employed the "primary effect" rationale to strike down statutes providing aid to sectarian educational institutions. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975) the Court struck down a portion of a Pennsylvania statute which authorized private elementary and secondary schools, including religious ones, to receive instructional material and equipment. Although the instructional material and equipment was secular in nature, the Court invalidated the statute because its primary effect advanced religion in view of "the predominantly religious character of the schools benefitting from the Act." *Id.* at 364. The Court stated:

> "... faced with the substantial amounts of direct support authorized by [the] Act ..., it would simply ignore reality to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then characterize [the] Act ... as channelling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." *Id.* at 365-66 *quoting Hunt v. McNair*, 413 U.S. at 743.

Once again, a similar result was reached in *Wolman v. Walter*, 433 U.S. 229 (1977) in which the Court struck down a portion of a state statute which authorized payment to private religious elementary and secondary schools for field trip supervision. Using the "primary effect" rationale as well as the "entanglement" test, the Court concluded that it was simply impossible to separate the secular functions performed by the schools from their sectarian ones.[7]

In *Committee For Public Education v. Nyquist*, 413 U.S. 756 (1972) and *Levitt v. Committee For Public Education*, 413 U.S. 472 (1972) the Court invalidated two New York statutes on the ground that their primary effect

[7] It should also be noted that the *Wolman* Court invalidated a portion of the statute which authorized pupils, or their parents, in religious schools to receive secular instructional material and equipment. In *Meek*, the material and equipment was given directly to the schools. The Court did not consider this distinction to be relevant for First Amendment purposes.

advanced religion. In *Nyquist*, the statute authorized direct payments to private elementary and secondary schools, including religious ones, for "maintenance and repair" of school buildings. The statute also authorized tuition reimbursements and a tax break directly to parents who sent their children to non-public schools.[8] The Court concluded that the secular and sectarian purposes of the religious schools were so intertwined that there was no practical way to keep them separate. With respect to the "maintenance and repair" provisions of the statute, the Court stated:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions . . . Absent appropriate restrictions on expenditures . . . , it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." 413 U.S. at 774.

With respect to the tuition reimbursement section of the act, the Court concluded that it, too, had a primary effect that advanced religion. The Court first observed that a direct payment of money to the school would be invalid under the establishment clause. The Court was unimpressed with the argument that the statute was saved

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[8] In striking down the "tax benefits" portion of the New York statute, the Court distinguished its ruling in *Walz v. Tax Commissi* [illegible] 397 U.S. 664 (1969) which upheld the constitutionality of property tax exemptions to religious organizations for properties used solely for religious worship.

because the reimbursements were made to the parents not to the schools. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. [T]he effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions."[9] *Id.* at 783. The decision in *Nyquist* was followed in *Sloan v. Lemon*, 413 U.S. 825 (1973) in which the Court struck down a Pennsylvania statute authorizing tuition reimbursements to parents who sent their children to non-public sectarian schools.

Finally, in *Levitt v. Committee For Public Education, supra*, the Court struck down a New York statute which authorized direct money grants to non-public elementary and secondary schools to perform "testing and recordkeeping" which was required by state law. Using the "primary effect" test, the Court ruled that the statute "constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." 413 U.S. at 480.

As is apparent from the foregoing, the focus of the "primary effect" test is upon the character of the religious institutions involved. Where the institution is dedicated to the inculcation of religious beliefs, state aid to that institution presents a serious risk of having a primary effect of advancing religion simply by virtue of the fact that it is

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[9] The Court rejected the contention that tuition reimbursements were, for First Amendment purposes, different from direct tuition payments.

practically impossible to isolate secular functions or purposes from the overriding role of the sectarian school to promote the tenets of such religious beliefs. This explains why state aid to sectarian colleges and universities has generally, been upheld while state aid to sectarian elementary and secondary schools is more likely to be viewed as violating the primary effect test. The United States Supreme Court has acknowledged that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton v. Richardson*, 403 U.S. at 685; *Committee For Public Education v. Nyquist*, 413 U.S. at 777 n. 32; *Hunt v. McNair*, 413 U.S. at 734. There tends to be a considerable amount of academic freedom at church-related colleges and universities and the Court has taken notice of the fact that, generally, such institutions of higher learning do not have a pervasive religious atmosphere. Moreover, church-related colleges and universities usually do not have as their principal function the indoctrination of religious beliefs. Finally, the age of college students is a factor supporting the Supreme Court's view that public funds will not be used to influence one's religious beliefs. Accordingly, it is much easier in the college setting to separate the school's secular functions from its, religious mission.

The same cannot be said for church-related elementary and-secondary schools. Such schools exist for the very purpose of teaching and promoting the tenets of a particular religious faith. The process of education at religiously operated elementary and secondary schools is inextricably bound to the task of indoctrinating pupils in the principles of their faith. That task or mission permeates the entire educational curriculum and is directed at an age group

which is particularly susceptible to religious indoctrination. It is this pervasiveness of religious purpose which is at the heart of the "primary effect" test.

The "Entanglement" Test

The "entanglement" test appears to have first surfaced in the Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In applying the "entanglement" test, the Court, listed the following factors to be considered: (a) the character and purposes of the institution receiving state aid, i.e., college or elementary or secondary school; (b) the nature of the aid provided (e.g., one lump sum payment or annual grants); (c) the resulting relationship between the sectarian institution and the government. The statutes at issue in *Lemon I* involved a Rhode Island law which provided for a direct 15%, reimbursement to teachers in non-public elementary and secondary schools, and a Pennsylvania law giving a limited reimbursement to non-public elementary and secondary schools for teachers salaries, text-books and instructional materials. Obviously, the salary reimbursements went only to teachers in purely secular subjects.

The Court took notice of the distinct possibility that a teacher in a non-public school will have difficulty in preventing his religious beliefs from "seeping" into his course of instruction.

> "We . . . recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it

> hard to make a total separation between secular teaching and religious doctrine."

Id. at 618-619.

In order to assure that non-public school teachers, who have received salary reimbursements, are abiding by the First Amendment and are not preaching religious doctrines in the class-room, the state would have to engage in "[a] comprehensive, discriminating and continuing . . . surveillance." "Unlike a book, a teacher cannot be inspected once so as to determine the extent . . . of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.* at 619. The Court in *Lemon I* emphasized that the state must be "certain" that "subsidized teachers do not inculcate religion." *Id. See also Meek v. Pittenger*, 421 U.S. 349, 370-71. To be "certain" that *non-public* school teachers are not using the classroom to instill religious beliefs, there would have to be almost constant monitoring of church-related schools. It is this monitoring or surveillance by the government which entangles it, to an excessive degree, with the church.

The "entanglement" test is usually applied in situations where the so-called "human factor" is involved; e.g., classroom teachers and other professionals providing diagnostic tests and therapeutic services. *See Meek v. Pittenger, supra; Wolman v. Walter*, 433 U.S. 229 (1977). It is these types of activities which require the most surveillance. Moreover, these activities tend to be funded on a continuous basis, rather than on a lump sum basis, thereby adding to the government's entanglement, with church-sponsored schools.

The "Political Divisiveness" Test

In *Lemon I* the Court also referred to the "potential for political divisiveness" which statutory programs providing for aid to church – related schools are likely to generate. It is unclear whether the "political divisiveness" language in the Court's opinion was intended to be an independent test under the Establishment Clause or whether it is part of the "entanglement" test. In any event, it has been referred to by the Court in *Lemon I*, *Roemer* and *Nyquist*. The underlying premise of the "political divisiveness" factor is that state aid to church-related schools is likely to engender very strong political views about the propriety of using public money to aid church-related schools. This is particularly true with respect to elementary and secondary school education since it is an important issue of local concern. The Court emphasized that political divisiveness and debate along religious lines was one of the principal evils which the First Amendment was intended to eliminate. Finally, the Court noted that the potential for political differences along religious lines is more likely to occur where the state aid is of a continuing nature.

Analysis

Having set forth the criteria by which a statutory enactment will be measured in order to determine whether it offends the First Amendment's Establishment Clause, it is now possible to examine the practice of contracting with sectarian elementary and secondary schools in light of these criteria.[10]

[10] Implicit in this statement is the question of what is meant by the term "sectarian". As used in this opinion, the term "sectarian" refers to

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1. The "Purpose" Test

Initially, there would appear to be no difficulty in concluding that the practice of contracting with sectarian schools or educational services has a secular purpose. The underlying purpose of such a practice would appear to be the general education of all elementary and high school students. This purpose is certainly secular in nature and would not violate the "purpose" test under the First Amendment. *See, e.g., Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. at 773; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. The "Primary Effect" Test

The application of the "primary effect" test to the practice of contracting for educational services with religiously operated elementary and secondary schools, presents a much thornier question. In applying the "primary effect" test to the various forms of statutory aid which have been reviewed by the United States Supreme Court the critical factor which has emerged is the character of the institutions which receive public funds. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1974). Where an institution is characterized by a pervasively religious atmosphere, the receipt of public funds by that institution, either directly or indirectly, presents a significant risk that the primary

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those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. This issue is discussed in greater detail in a later section of this opinion.

effect of such state aid will be to advance religion in contravention of the Establishment Clause of the First Amendment.

Assuming that a contract is made with a sectarian school for educational services, the effect of such a contract will be to expend public funds to send students to a religiously operated elementary or secondary school. While it is contemplated that such a contract would involve only secular educational services, it would seem highly unlikely that the school's secular functions could be separated from its predominantly religious purpose. It is difficult to imagine how the practice of contracting for educational services with religious schools differs from the tuition reimbursement program invalidated by the United States Supreme Court in *Committee for Public Education v. Nyquist, supra.* Indeed, the effect of such a contract is to make a direct payment of public money to a sectarian school for the purpose of providing educational services to elementary and high school students. In striking down a New York statute which attempted to provide tuition reimbursement to parents who sent their children to non-public sectarian schools, the United States Supreme Court stated:

> "There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . . "

Committee for Public Education v. Nyquist, 413 U.S. at 780.

In view of the foregoing, it is our conclusion that the practice of contracting with and paying the tuition of students at sectarian elementary and secondary schools

has a primary effect which advances religion and, therefore, violates the Establishment Clause of the First Amendment

3. The "Entanglement" Test

The practice fares no better under the "entanglement" test adopted by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In those instances where elementary and secondary students attend sectarian schools at public expense, the state would have to engage in a program of constant surveillance in order to be "certain" that non-public school teachers were not allowing religious instruction to "seep" into the secular educational curriculum. It is such excessive surveillance which entangles the state in the affairs of church-related schools such that the First Amendment is violated. Once again, the fact is that public funds would be expended to send children to a sectarian school and there would be no effective means of assuring that the wall of separation between church and state had not been breached. Accordingly it is our conclusion that the practice of contracting with sectarian schools for the purchase of educational services results in excessive entanglement between the state and such sectarian schools and therefore violates the First Amendments Establishment Clause.

4. The "Political Divisiveness" Test

Finally, the practice in question, when applied to sectarian elementary and secondary schools, could very well engender the type of political divisiveness along religious lines which the Supreme Court has indicated the First Amendment seeks to avoid. Members of a local

community tend to divide sharply on religious issues and it is easy to envision a situation in which members of a local community differ widely on whether public money should be expended to send students to religiously operated elementary and secondary schools. Such political divisiveness could be exacerbated by the fact that the duration of some contracts with sectarian schools could extend over a period of years.

Based upon the decisions of the United States Supreme Court, as examined above, it is our conclusion that the practice of paying the tuition of students attending sectarian elementary and secondary schools violates the Establishment Clause of the First Amendment to the United States Constitution.

State Court Decisions

As additional support for our conclusion, it should be observed that the Justices of the Maine Supreme Court have issued an opinion on proposed legislation which would have authorized the making of contracts with sectarian schools for secular educational services. In 1970 the 104th Legislature considered enacting L.D. 1751 (H.P. 1394) being "An Act Creating the Nonpublic Elementary Education Assistance Act". This proposed Act would have permitted administrative units "to contract and pay for secular education service." The use of this contractual authority was limited to situations where the local school committee had determined that the closing of a non-public school would have an adverse impact on the local tax rate or on classroom space in the public school system. In view of the possibility that the proposed Act implicated First Amendment concerns, the Legislature requested an

advisory opinion from the Justices of the Supreme Judicial Court. In *Opinion of the Justices*, Me., 261 A.2d 58 (1970), the Justices responded with four of them concluding that the proposed legislation violated the Establishment Clause and two of them reaching the opposite result.[11]

Mr. Chief Justice Williamson and Justices Marden and Weatherbee were of the opinion that the proposed Act ran afoul of both the "purpose" and the "primary effect" tests.

> "Budgets for the secular instruction may be technically separable from the budget of the entire operation of the [sectarian] schools, but the institution is an inseparable whole, which is strengthened in its institutional purpose when it is strengthened in any of its departments by outside financial assistance."

261 A.2d at 67.

Mr. Justice Webber reached a similar conclusion in a separate answer in which he stated that "my concern is that what in the legislative proposal is termed a contract for secular educational service will be viewed as in reality a method for providing public aid to a sectarian school in support of all of its purposes." 261 A.2d at 69.

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[11] It should be noted that the *Opinion* was issued while *Lemon v. Kurtzman* was pending before the United States Supreme Court. Consequently, the Justices did not have the benefit of a clear application of the "entanglement" test. All of the Justices appeared to have recognized the importance of the *Lemon* case. In fact, Mr. Chief Justice Williamson was of the opinion that *Lemon* would be totally dispositive of the issue.

Former Chief Justice Dufresne and Mr. Justice Pomeroy were of the view that the proposed Act did not offend the First Amendment. Both Justices relied heavily on the lower court's decision in *Lemon v. Kurtzman* which was later reversed by the United States Supreme Court. In view of the decision in *Lemon I*, and later Supreme Court cases, it is probable that the opinions of Justices Dufresne and Pomeroy would be different today.

While there are many differences between the proposed Act examined by the Supreme Judicial Court in *Opinion of the Justices, supra*, and the practice now under consideration, they both involved contracts with sectarian schools for secular educational services. Based upon the Justices *Opinion* and the Supreme Courts decisions in *Lemon v. Kurtzman* and *Committee for Public Education v. Nyquist*, there would appear to be a strong likelihood that the Law Court, if given the opportunity, would invalidate the practice of contracting for educational services with sectarian elementary and secondary schools.

Finally, courts in other Jurisdictions have uniformly held that statutes authorizing contracts with sectarian schools for secular educational services offend the Establishment Clause of the First Amendment. *See, e.g., John v. Sanders*, 319 F.Supp. 421, 430 (D.Conn.), *aff'd*, 403 U.S. 955 (1970); *Opinion of the Justices*, 357 Mass. 836, 258 N.E.2d 779 (1970); *In Re Proposal C*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Swart v. South Burlington Town School District*, Vt., 167 A.2d 514 (1961).

Conclusion

The following will summarize our conclusions regarding the constitutionality of the practice of using public

funds to contract with and pay for the tuition of students at sectarian elementary and secondary schools. We conclude: that the practice has a secular purpose and does not offend the First Amendment on that ground; that the practice has a primary effect which advances religion and violates the Establishment Clause of the First Amendment on that ground; that the practice produces excessive entangle-meet between the State and sectarian schools, and, consequently, violates the First Amendment on that ground. Finally, we note that the practice carries the potential for generating political divisiveness along religious lines and may violate the First Amendment on that basis also.

As discussed previously,[12] it is a fundamental canon of statutory construction that legislation is to be interpreted, if possible, so as to avoid rendering it unconstitutional. Where a statute is susceptible of two interpretations, the courts are bound to adopt that interpretation which sustains the statute's constitutionality in view of our conclusion that the practice of contracting with sectarian elementary and secondary schools for educational services offends the First Amendment, it is now necessary to determine whether sections 213-A, 912, 1289, 1291 or 1454 of Title 20 authorize school administrative units or districts to engage in such a practice. Each statute authorizes administrative units or districts or the Commissioner of Education, in limited situations, to pay the tuition for students at a private academy or at some other approved elementary or secondary school. None of the statutes explicitly include or exclude sectarian schools from their

[12] *See* pages 3-5 *supra.*

operation. To interpret the statutes as permitting school administrative units and districts to contract with sectarian schools for educational services would render them at least partially unconstitutional. On the other hand, an interpretation that the legislation does not authorize such a practice is a reasonable construction of the statutes and is consistent with the favored rule that statutory enactments should be construed, whenever possible, so as to uphold their constitutional validity.

In light of our conclusion that the practice of contracting with and paying the tuition for students at sectarian elementary and secondary schools is unconstitutional, we interpret 20 M.R.S.A. §§213-A,-912, 1289, 1291 and 1454 (1965-1979 Supp.) as not authorizing such a practice.[13] As so interpreted, it is our conclusion that sections 213-A, 912, 1289, 1291 and 1454 of Title 20 do not violate the First Amendment.

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[13] Even assuming that the statutes are interpreted as permitting school administrative units and districts to contract with sectarian schools, our conclusion that the practice is unconstitutional would remain unchanged. Moreover, any provision of the statutes deemed violative of the First Amendment would be severable from other statutory provisions. *See* 1 M.R.S.A. §71(8) (1979) which provides:

> "The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application."

Application of Opinion

During the course of this opinion, we have repeatedly referred to "sectarian" elementary and secondary schools and have concluded that the practice of using public funds to send students to such schools is unconstitutional. As used in this opinion and in the decisions of the United States Supreme Court, the term "sectarian" refers to those institutions which are characterized by a pervasively religious atmosphere and whose dominant purpose is the promotion of religious beliefs. The question of whether a particular school is pervasively religious in nature is a factual one and must be determined on an individual basis. *See, e.g., Weiss v. Bruno*, 82 Wash. 2d 199, 409 P.2d 973, 979-89 (1973). It is, of course, conceivable that, there may exist elementary and secondary schools which are religiously affiliated to a nominal degree only and are not necessarily characterized by a pervasively religious atmosphere. Within the context of this opinion, however, it is simply not possible to examine each religiously affiliated school to determine whether it is pervasively sectarian for First Amendment purposes.[14]

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

---

[14] The United States Supreme Court has had no difficulty in concluding that those institutions which might be described as typical "parochial or "religious" schools are pervasively sectarian. As noted above, however, there may be situations where a school is only nominally affiliated with a religious organization, and such nominal affiliation may be insufficient to characterize the school as a pervasively sectarian institution.

Sincerely

/s/ _____
RICHARD S. COHEN
Attorney General

No. 06-132

In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The legislative history of the original enactment of the Maine statute in 1982 barring public funding of sectarian school tuition, 20-A Me. Rev. Stat. Ann. § 2951(2), is sparse. Two years prior to the enactment of section 2951(2), the Maine Attorney General opined that public funding of tuitions to sectarian schools would violate the Establishment Clause and noted that excessive entanglement was a significant factor. The legislative history does not indicate the extent to which Maine legislators relied on that opinion or whether they had additional reasons for enacting section 2951(2). The legislative history of the Legislature's consideration and rejection of a bill to repeal that provision in 2003 expressly sets forth a number of additional justifications to retain section 2951(2). The questions presented are:

1. Whether the Supreme Judicial Court of Maine properly considered the rationale of excessive entanglement when assessing a constitutional challenge to section 2951(2).

2. Whether petitioners have carried their burden of demonstrating that the only justification for the actions of the Maine Legislature was its understanding of the Establishment Clause.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Maine Department of Education and Commissioner Susan Gendron respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Supreme Judicial Court of Maine ("SJC"), issued on April 26, 2006, reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-40, reported in *Anderson v. Town of Durham,* 895 A.2d 944 (Me. 2006).

STATEMENT OF THE CASE

There have now been two rounds of litigation and four decisions upholding Maine's unique secondary public education program which limits public funding of tuitions to nonreligious schools, 20-A Me. Rev. Stat. Ann. § 2951(2). In the first round, the United States Court of Appeals for the First Circuit and the SJC rejected Free Exercise Clause, Establishment Clause and Equal Protection challenges, and this Court denied petitions for writs of certiorari in both cases. *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied,* 528 U.S. 947 (1999); *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied,* 528 U.S. 931 (1999). In the second round, both the First Circuit and the SJC again upheld section 2951(2) against First Amendment and Equal Protection challenges. *Eulitt v. State of Maine, Dep't of Education,* 386 F.3d 344 (1st Cir. 2004); *Anderson v. Town of Durham* (App. 1). Both appellate courts applied *Locke v. Davey*, 540 U.S. 712 (2004), in upholding the Maine statute in the second round. The plaintiffs in *Eulitt* chose not to file a petition for a writ of certiorari while those in *Anderson* now have filed.

1. Maine Public Education. Partly because of its relatively low population density and large number of local school administrative units, Maine's publicly funded education system has evolved into one distinct from those found elsewhere. The policy of the State is that "every person within the age limits prescribed by state statutes shall be provided an opportunity to receive the benefit of a free public education." 20-A Me. Rev. Stat. Ann. § 2(1); *see also* Me. Const., art. VIII, § 1. Although the so-called "Blaine Amendments" are named after a Mainer, our State declined to add one, or anything comparable, to the Maine Constitution. *See Bagley,* 728 A.2d at 132 n.8 (historical overview of Blaine Amendments). In the past, a few religious schools in Maine received direct public funding out of necessity,[1] and did so on a very limited basis until 1980.[2] Today, every Maine student has the opportunity to avail herself of the same type of publicly-funded education – a nonsectarian education, either at a publicly or

---

[1] Maine's tradition is one of civil, not ecclesiastic, education. From early statehood, Maine mostly had free public schools run by local officials, and, in fact, a constitutional provision to endow religious institutions was defeated by Maine's Constitutional Convention in 1819. Ernst C. Helmreich, *Religion and the Maine Schools; An Historical Approach*, at 8, 11-13 (1960). Certainly, where no public schools existed, religious ones filled the need, but as public education evolved in Maine, as it has nationally, secular education became the norm. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) (noting that "[f]ree public education" is "faithful to the ideal of secular instruction").

[2] In 1979-80, Maine had over 70,000 high school students, and over 17,000 of those students were publicly tuitioned. (*Anderson v. Town of Durham*, Appendix to the Supreme Judicial Court of Maine ("SJC App.") 73, 143). Of the publicly tuitioned students, only 211 (or approximately 1.2 percent) attended religious secondary schools. *Id.* Of those 211 students, over half attended one school. *Id.; Bagley*, 728 A.2d at 138 n.19.

privately operated school. Petitioners seek to expand the program to include sectarian schools for a certain portion of the student population so that these students can receive a religious education at public expense.

Public education in Maine is funded by a combination of state and local dollars, and the State and local school administrative units provide public education in a variety of ways. 20-A Me. Rev. Stat. Ann. § 1001(8). A school administrative unit may build and operate its own high school. 20-A Me. Rev. Stat. Ann. §§ 15902, 15904 & 15905. Alternatively, a school administrative unit may contract with another school administrative unit or private school approved for tuition purposes, or pay tuition for students to obtain their public education at a public or private school that meets basic approval criteria for compulsory education purposes and is also approved for tuition purposes (hereafter "publicly tuitioned"). 20-A Me. Rev. Stat. Ann. §§ 2951, 5204(4). Under the latter two alternatives, the tuitions are paid by the school administrative unit directly to the public and private schools.

In 1979, a Maine legislator sought an opinion from the Attorney General whether Maine's statutes were constitutional insofar as they allowed students to attend religious schools with publicly-funded tuition. (App. 68). In January of 1980, the Attorney General issued an opinion that using public funds to pay tuition to sectarian schools would violate the Establishment Clause, and the existing Maine statutes should be read as not permitting such a practice, thereby avoiding any finding that Maine statutes were unconstitutional. Op. Me. Att'y Gen 80-2 (1980) (App. 68). The Attorney General noted, *inter alia,* that excessive entanglement was a significant factor. (App. 91). Facing the withdrawal of public funding, one religious school

(John Bapst) successfully transformed itself into a nonsectarian one. *Bagley,* 728 A.2d at 138 n.19; *Anderson v. Town of Durham,* Appendix to the Supreme Judicial Court of Maine ("SJC App.") 72-73.

In 1982, as part of a recodification of Maine's education laws, the Legislature enacted section 2951(2), as follows:

> A private school may be approved for the receipt of public funds for tuition purposes only if it:
>
> * * *
>
> 2. NONSECTARIAN. Is a nonsectarian school in accordance with the First Amendment of the United States Constitution. . . .

Me. Pub. L., 1981, c. 693, § 3.[3] The legislative history is relatively silent regarding the rationales of the Legislature, other than to note that the legislation "does not . . . contain any substantive changes whatsoever." 1 Me. Leg. Rec. 229 (1982). There is no legislative report or debate that establishes that the Legislature enacted section 2951(2) only to avoid Establishment Clause violations.

Petitioners argue that section 2951(2) is unconstitutional only insofar as it precludes use of public funds to pay for the religious secondary education of their children under the public tuition program. Petitioners appear to concede that Maine can constitutionally deny public

[3] Because Maine has a two-year legislative session, although passed in 1982 this statute is cited as a 1981 Public Law, thus resulting in references to it as both a 1981 and a 1982 law.

funding of religious education in the operation of public schools and in contracts with private ones.

Finally, Maine law accommodates religious education in several ways. Maine permits funding of transportation and secular textbooks for religious schools. 30-A Me. Rev. Stat. Ann. §§ 5724(5) & (6). Maine statutes also have an express exemption for sectarian schools from the dictates of Maine's Human Rights Act regarding employment. 5 Me. Rev. Stat. Ann. §§ 4553(4), 4573-A(2) ("a religious organization may require that all applicants and employees conform to the religious tenets of that organization."); *see also* 26 Me. Rev. Stat. Ann. § 1043(11)(F)(21)(a) (exemption from unemployment insurance responsibilities for churches and religious organizations).

2. Operative Facts. The facts in this case are largely stipulated. (SJC App. 70-106). The petitioners are parents of high school age children who reside in the Maine towns of Minot, Raymond, and Durham. The school administrative units within these towns do not operate public high schools, and two of them tuition some of their students at public and private schools. (*Id.* at 80-86). Petitioners agree that all of these towns provide opportunities for at least an adequate publicly tuitioned education at publicly operated or privately operated nonsectarian high schools. (*Id.* at 74, 82, 84, 86).

The petitioners have elected to send their children to pervasively religious private schools that do not qualify as nonsectarian schools for payment of public tuition. The petitioners' children attend or have attended St. Dominic Regional High School which is a Roman Catholic school, or Union Springs or Pine Tree Academies which are Seventh Day Adventist schools. (SJC App. 86-93). Attendance at a

sectarian school is not required by petitioners' religions, and attendance at a nonsectarian school is not prohibited by their religions. (*Id.* at 95). Neither the State nor the towns have prevented any of the petitioners' children from attending these sectarian schools. (*Id.*)

All three sectarian schools require identification of religious denomination on applications for admission. (SJC App. 87, 90, 92). Courses in the Roman Catholic or Seventh Day Adventist religion are required each semester at the respective schools, and a student cannot avoid religious teachings at these schools. (*Id.* at 86-94).

St. Dominic Regional High School's admissions policy gives preference to students whose families are registered members of Catholic parishes. (SJC App. 86-87). Catholicism is part of every class. (*Id.*) Applicants for teaching positions must mirror "gospel values" and understand the role of the school as a "unique pastoral, educational agency of the church," and must take Catholic religious education programs. (*Id.* at 88). Approximately 75 percent of St. Dominic's students are Catholic, and over 88 percent of the professional staff is Catholic. (*Id.*) All of Pine Tree's professional staff are Seventh-day Adventists, as are 75 to 85 percent of the high school students. (SJC App. 88).

The Commissioner of the Maine Department of Education has the responsibility to oversee Maine's public education system. 20-A Me. Rev. Stat. Ann. §§ 201(1), 254, 2954, 2902(7), 2951(5), & 4704. The Commissioner has the authority and obligation to investigate and disapprove of biased, intolerant or anti-American instruction in public schools and nonsectarian private schools that accept public funds. *Id.*; SJC App. 125-30. She has great difficulty envisioning how to do so with respect to religious schools.

Maine's anti-discrimination statutes are inapplicable to them, 5 Me. Rev. Stat. Ann. § 4573-A, and she does not, and believes she cannot, oversee or review the religious component of sectarian schools, no matter what they teach.[4] (SJC App. 125-30). Below, petitioners failed to rebut the Commissioner's testimony regarding oversight and entanglement difficulties that would occur if Maine were forced to fund religious education.

3. Procedural Background. As noted above, in 1999, both the SJC and the First Circuit rejected constitutional challenges to section 2951(2) virtually identical to those presented here. *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied,* 528 U.S. 947 (1999); *Strout v. Albanese,* 178 F.3d 57 (1st Cir.), *cert. denied,* 528 U.S. 931 (1999). Regarding the Equal Protection challenges, the State relied upon one rationale – that the state of the law was such that direct public funding of religious schools would violate the Establishment Clause. Both Courts found that rationale to be legitimate, and concluded there was no violation of Equal Protection. In passing, the SJC in *Bagley* in *dicta* noted a concern over excessive entanglement. *Bagley,* 728 A.2d at 146.

Three years later, the Supreme Court issued its decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Relying upon *Zelman*, proponents of public funding

[4] Some of the petitioners asserted that public money should fund sectarian schools no matter what they teach as part of their religion including anti-American and intolerant views, while others testified that the state should not fund religious schools where the religion supports abortion, witchcraft, anti-Catholic or anti-American religious tenets. (SJC App. 98-99, 100-101, 103).

of religious education went to the Maine Legislature as well as both federal and state courts.

(1) With the assistance of several petitioners and their present counsel, a bill to repeal section 2951(2) was brought before the Maine legislature in 2003. According to one of its primary sponsors, the bill "was collaborative of a number of parents as well as the Roman Catholic Diocese." (SJC App. 74, 112, 167-68). Both the Maine House and the Senate rejected the bill. (*Id.* at 75-76). In the debates, the justifications for the Legislature's refusal to fund tuitions at religious schools were identified, and included:

> The government has an important oversight role with respect to what is taught in schools but cannot, and should not, oversee the religious components of any school. Because of that, public funds should not pay for an education over which the state cannot have complete oversight.
>
> A publicly funded education system works best when that education is one of diversity and assimilation, and not a "separate and sectarian" one.
>
> Public funds should pay for a religiously neutral rather than a religious education.
>
> Religious schools can, and reserve the right to, discriminate in favor of those of their own religion, and this State should not fund discrimination.
>
> Maine's school system is not failing, and therefore *Zelman* does not apply.

(SJC App. 112-16, 169-78). No legislator – even those supporting the bill – suggested that the bill should be passed because the publicly funded options available to

high school students in such towns as Raymond, Durham or Minot were inadequate.

(2) The lawsuit filed in federal court made essentially the same arguments and sought the same relief as in the present matter. On October 22, 2004, the First Circuit decided that section 2951(2) did not violate the First Amendment or Equal Protection Clause, and that the holding in *Locke v. Davey*, 540 U.S. 712 (2004), applied to this controversy. *Eulitt v. State of Maine, Dep't of Education,* 386 F.3d 344 (1st Cir. 2004). The First Circuit read *Locke* as recognizing "that state entities, in choosing how to provide education, may act upon their legitimate concerns about excessive entanglement with religion, even though the *Establishment Clause* may not require them to do so." *Id.* at 355.

The appeals court found that section 2951(2) easily passes the tests identified in *Locke*, finding no animus towards religion. *Id.* With respect to the Equal Protection claim, the *Eulitt* court applied the rational basis test as prescribed by *Locke.* The appeals court relied upon rationales, including those specifically considered by the Legislature when it rejected the recent effort to change the law in 2003, which the plaintiffs there conceded sufficed. *Id.* at 356.

(3) In state court, the SJC agreed with *Eulitt* that *Locke* provided the test to determine the constitutionality of a state's decision *not* to fund religious education. (App. 17-22). As the First Circuit had, the SJC found that section 2951(2) did not exhibit animus towards religion because "None of the parties in this case has asserted that attendance at public or secular private schools is proscribed by their faith, or that they are being punished for

engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs." (App. 27). The SJC also explained that the Attorney General's opinion was not motivated by animus towards religion but rather it sought to ensure the conformance of Maine's education system with the Supreme Court precedent of the time as well as to avoid damage claims and attorneys fees under 42 U.S.C. § 1983. The Legislature was not motivated by animus towards religion to the extent it followed that advice. (App. 24). Therefore, the rational basis test applied to the Equal Protection claim. (App. 28-30).

The SJC appropriately reevaluated its prior analysis of the Equal Protection claims in light of *Zelman* and *Locke*. (App. 14-31). The SJC considered the petitioners' arguments that the only justification for the enactment of section 2951(2) was to avoid Establishment Clause violations, that Maine could not proffer any other rationale, and that such a rationale was no longer viable in light of *Zelman*. The SJC read *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), as foreclosing other rationales only where the "'asserted purpose *could not have been* a goal of the legislation.'" The SJC went on to find that "[t]he justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals," and concluded that "[a]voiding excessive entanglement between religion and state, a component of compliance with the *Establishment Clause*, was an original justification for the statute, and is asserted by the State in this litigation." (App. 29).

The SJC explained that, normally, excessive entanglement analysis is conducted in the context of a state program that already provides aid to religious institutions,

but here "[b]ecause we operate in terms of conceivable justifications, we can evaluate the hypothetical situation." (App. 29). The Court concluded, first, that it is conceivable that, "even after *Zelman,* under some set of facts, funding tuition for sectarian schools would run afoul of the Establishment Clause on excessive entanglement grounds," and it is unclear whether any sectarian schools would even wish to accept the entanglements that might arise from state oversight. (App. 29-30). In addition, the SJC concluded that avoidance of the significant entanglement that could arise because "payment [of the tuition] subjects a school's educational and religious practices to state regulation" "provides a rational basis to maintain the funding limitation in section 2951(2)." (App. 30-31).

REASONS THE PETITION SHOULD BE DENIED

The two questions presented by the Petition focus exclusively on the narrow issue of what particular governmental objectives can be considered in assessing the constitutionality of this statute. The Petition for a Writ of Certiorari does not ask this Court to address whether Maine's public education statute, in actual operation, violates the Free Exercise, Establishment, or Equal Protection Clauses. The SJC's ruling on the fact-laden issues presented does not merit this Court's attention because, among other reasons, the premises underlying the two questions presented are entirely unfounded.

Petitioners' questions presented assume that concerns about excessive entanglement could not conceivably have been a goal of the Maine legislature when it enacted section 2951(2), and, conversely, that the provision was

"based solely on a misinterpretation of the Federal Establishment Clause." Petition, at i. Neither assumption is well-founded. There is no basis in the record to conclude that motivations other than avoidance of Establishment Clause violations "could not have been" before the Legislature in 1982 when it originally enacted section 2951(2). The SJC properly applied *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), because another motivation – excessive entanglement – was identified at that time and for that matter noted by the SJC in *Bagley* in the first round of litigation. Simply put, the record fully supports the SJC's finding that a motivation other than avoiding Establishment Clause violations was before the Legislature in 1982. With regard to the Equal Protection claim, both courts considered rationales other than the one pressed in the first round of litigation. In *Eulitt*, the plaintiffs correctly conceded these other rationales could be relied upon by the court, and, in *Anderson*, the petitioners failed to carry their burden that, at the very least, the entanglement justification "could not have been" considered by the Legislature.

Even had petitioners directly presented their First Amendment and Equal Protection claims to the Court, certiorari would not be warranted. Neither petitioners nor their supporting *amici* identify any conflict in the lower courts regarding the meaning or application of *Locke,* because there is none. The SJC's decision, moreover, is fully consistent with *Locke*. In a straightforward manner, the SJC in *Anderson*, just as the First Circuit in *Eulitt*, determined that Maine's law did not mandate civil or criminal sanctions, did not inhibit political activities, and did not force a choice between one's religion and a

government benefit, and further that the history of the law did not evince animus towards religion.

Further, Maine's education system is unique, and neither petitioners nor their supporting *amici* identify any other education system that would be impacted by the decision. The SJC's decision does not preclude a state from deciding to follow *Zelman* and directly fund religious education. This dispute does not bring into play a Blaine Amendment, or any other state constitutional provision prohibiting public funding of religious schools or institutions, as no such provision was ever adopted in Maine. Petitioners and their supporting *amici* simply disagree with the educational policy decision made twice by the Maine Legislature, both before and after *Zelman,* not to publicly fund religious secondary schools with tuitions. Finally, the lower courts' reliance upon excessive entanglement as a valid rationale for section 2951(2) under the Equal Protection Clause is correct and no case has held otherwise.

I. BOTH QUESTIONS PRESENTED ARE PREMISED ON THE INCORRECT ASSERTION THAT THE ONLY CONCEIVABLE MOTIVATION OF THE MAINE LEGISLATURE IN 1982 WAS TO SATISFY THE ESTABLISHMENT CLAUSE.

A. There Is No Basis in the Record to Conclude that the Only Possible Motivation of the Legislature in 1982 Was to Satisfy the Establishment Clause.

The petition here, as stated in its Questions Presented, is premised entirely upon the assertions that the SJC in its Equal Protection analysis relied upon grounds that "were not the actual goal of the legislators" and that

the sole basis of section 2951(2) was "a misinterpretation of the Federal Establishment Clause." Petition, at i. The record does not support those assertions. The actual legislative history of section 2951(2) is sparse at best. There is not a thing in the legislative record indicating that the Legislature in 1982 considered only the Establishment Clause. While the Establishment Clause concerns were the ones that most readily come to the fore, there is no way of knowing all of the motivations of the Legislature on such a bare record.

Moreover, the SJC in *Anderson* considered other concerns that were most definitely before the Legislature in 1982 (and in 2003 as well): entanglement arising from state regulation of a religious school and the instruction therein.[5] Avoiding excessive entanglement was identified as a problem by the Attorney General in his 1980 opinion (App. 91) which petitioners claim set in motion the enactment of section 2951(2), and, moreover, was recognized in *dicta* by the SJC in *Bagley*. 728 A.2d at 146-47. In sum, the record does not support petitioners' premise that the only basis of section 2951(2) was Establishment Clause concerns, and instead supports the SJC's conclusion that

[5] The SJC in *Bagley* did state that the only justification presented by the State in that litigation was compliance with the Establishment Clause. *Bagley*, 728 A.2d at 131, 138. There is no legal or logical bar to consideration of other rationales now. Maine has not taken "inconsistent positions" from those taken in *Strout* or *Bagley*, just additional ones, and, even if Maine did so judicial estoppel does not pose a bar. *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 369 (1946) ("the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states"). Thus, Maine certainly may present in the second round of litigation rationales and arguments not proffered in the first.

avoiding excessive entanglement was an original justification of the statute (App. 29).[6]

B. The SJC Properly Applied *Wiesenfeld.*

Petitioners urge this Court to grant certiorari on the grounds that there is a division of authority on whether a court can consider rationales other than the one that actually motivated it. Petition, at 10-16. According to petitioners, the SJC's consideration of another motivation is in conflict with *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975), as well as *Christian Science Reading Room v. City of San Francisco,* 784 F.2d 1010, 1013 *amended by* 792 F.2d 124 (9th Cir. 1986), *cert. denied,* 479 U.S. 1066 (1987), and *Delaware River Basin Comm'n v. Bucks Cty. Water & Sewer Auth.,* 641 F.2d 1087 (3d Cir. 1981). To the contrary, the SJC faithfully applied *Wiesenfeld* to the legislative record before it.

The basic legal principles are not in dispute. Under the rational basis test, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rather, the party attacking the statute has "the burden to 'negative every conceivable basis which might support it.'"

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[6] In addition, petitioners are incorrect in assuming that the "misinterpretation of the Establishment Clause" rationale is no longer viable. Presently, there is no program allowing public funds to pay for tuitions for religious education in Maine. As noted by the SJC, therefore, the courts must assess petitioners' claims in terms of *any* conceivable program that might present Establishment Clause problems. (App. 29-30). It cannot be disputed that "[i]t remains conceivable, even after *Zelman*, that under some set of facts, funding tuition for sectarian schools would run afoul of the *Establishment Clause* on excessive entanglement grounds." (*Id.*)

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993) (citations omitted). "[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications,* 508 U.S. at 315; *see also United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (where there is a plausible reason for the statute, it is "'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision'" (citation omitted)); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.") A court "'consider[s] purposes advanced by counsel for the [government] or suggested initially by [itself],' as long as '[it is] careful not to attribute to the [government] purposes which it cannot reasonably be understood to have entertained.'" *Christian Science Reading Room,* 784 F.2d at 1013 (citations omitted). As this Court recognized in *Wiesenfeld,* conceivable purposes, even those not mentioned by the legislature, may be considered except where the challenger "demonstrates that the asserted purpose could not have been a goal of the legislation." 420 U.S. at 648 n.16.

The SJC faithfully applied these precedents, and in particular *Wiesenfeld*:

> The parents argue that the State is barred from offering additional, hypothetical rationales for the statute because the actual rationale is known, citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). The Court stated in *Wiesenfeld* that a court "need not in equal protection cases accept

> at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not have been* a goal of the legislation." *Id.* (emphasis added). This is a different proposition from stating that only the precise purposes articulated by members of the Legislature and recorded in the legislative record may be considered. Thus, we are not bound by the justification proffered by the State in support of the statute in *Bagley,* or offered in support of the legislation in 1981. The justifications for the statute asserted by the State now are not inconsistent with or contradictory to prior stated goals. Avoiding excessive entanglement between religion and state, a component of compliance with the Establishment Clause, was an original justification for the statute, and is asserted by the State in this litigation.

(App. 29). The SJC's conclusion that the Maine Legislature conceivably enacted section 2951(2) based on concerns of excessive entanglement is fully consistent with the legislative record. As discussed earlier, there is no persuasive evidence that the Legislature enacted section 2951(2) *only* because it wanted to avoid violating the Constitution. Simply put, petitioners failed to prove that under no circumstances could the Legislature in 1982 have conceived of entanglement (or for that matter the other concerns more explicitly identified by the Legislature in 2003).[7] Indeed, petitioners cannot possibly carry their

[7] As described above, during the debates in 2003 when the Legislature voted not to repeal section 2951(2), a number of rationales were specifically discussed, including some that were not identified earlier. The First Circuit took cognizance of those other articulated rationales when it upheld the statute, *Eulitt*, 386 F.3d at 356, while the

(Continued on following page)

burden because entanglement concerns in particular were explicitly identified in the 1980 Attorney General's opinion.

Finally, we note that the record here is in stark contrast with that in *Wiesenfeld.* In that case, the Court had before it a 1939 House Report, a 1938 Final Report of the Advisory Council on Social Security, and 1939 Congressional hearings, as well as 1971 Advisory Council Reports, all directly and specifically identifying the sole justification for the challenged disparate treatment of husbands and wives in the Social Security Act. *Wiesenfeld,* 420 U.S. at 647, 649, 653. We have no similarly clear record that the Maine Legislature only considered the Establishment Clause rationale in 1982.[8]

SJC apparently did not find it necessary to go beyond those issues identified in the Attorney General's opinion. It is our position that these other reasons can be relied upon as well because there is no record indicating they *could not have been* considered by the Legislature in 1982, and because, in fact, they were considered in 2003. *See Bob Jones University v. United States*, 461 U.S. 574, 601 (1983) (Court considered legislative history regarding Congress' failure to act). Indeed, petitioners themselves rely upon the 2003 legislative record to support their arguments. Petition, at 14 n.14.

[8] Likewise, in *Christian Science Reading Room*, the appeals court had before it a detailed history of letters, eviction notices, and meetings which made clear that the only reason the airport evicted the religious organization was Establishment Clause concerns. 784 F.2d at 1010-12. The split decision in *Delaware River Basin Comm'n* affords petitioners no help because the majority explained that the legislative history did not disclose the purposes of the regulation, and that the court could consider rationales *not* set forth in the legislative history. 641 F.2d at 1093-1100. The court, however, found that the justifications put forward by the trial court and counsel were not rationally related to the achievement of the regulation's goals. *Id.*

II. EVEN IF THE PETITION HAD ACTUALLY PRESENTED THE QUESTION WHETHER THE MAINE PUBLIC EDUCATION SYSTEM OPERATES IN VIOLATION OF THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSE, CERTIORARI WOULD NOT BE WARRANTED.

A. There Is No Post-*Locke* Split in the Lower Courts.

Neither petitioners nor *amici* have identified any conflict within the lower courts regarding the application or meaning of *Locke* on the issues of whether a state's decision not to fund religious education violates the Free Exercise, Establishment or Equal Protection Clauses. As noted, both the First Circuit and SJC fully agree and independently found (1) that *Locke* applies to the issue of whether a state must fund religious secondary education, (2) that no animus towards religion has been established in Maine, and (3) that the policy decision of the Maine Legislature is supported by constitutional rationales. The only other pertinent case fully agreed with the First Circuit and the SJC that *Locke* applies to school funding issues regarding secondary schools, and applied *Locke* in the same manner. *Bush v. Holmes,* 886 So.2d 340, 362-66 (Fla. 1st Dist. Ct. App. 2004) (*en banc*) (Florida Constitution's prohibition on aid to religious schools does not violate the Free Exercise Clause), *aff'd on other grounds,* 919 So.2d 392 (Fla. 2006).

Petitioners' reliance on *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002), *cert. denied,* 539 U.S. 942 (2003), is misplaced for at least two reasons. First, *Tenafly* preceded *Locke,* and, second, it does not involve school funding. The case dealt with the application of a zoning ordinance to a temporary religious

structure, not school funding. The Texas *amici* brief cites to two lower court cases. Those decisions, too, preceded *Locke*. *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998); *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995). The "much needed guidance" to resolve the perceived conflict of these decisions with those in *Bagley* and *Strout* was noted in *Columbia Union College v. Clark,* 527 U.S. 1013, 1015 (1999) (Thomas, J., dissenting from denial of certiorari), but that "guidance" has now been provided in *Zelman* and *Locke*. There is no conflict in the lower courts post-*Locke* regarding the balance established by these two cases, and therefore certiorari should be denied.[9]

B. The SJC's Decision is Fully Consistent with *Locke*.

The arguments of petitioners and *amici* that a state legislature must fund religious education whenever it uses private schools to provide the type of education afforded in a publicly-operated school finds no support in this Court's decisions. This Court has never ordered a state legislature to so fund religious education.

The real aim here is to reargue *Locke*. Petitioners and *amici* suggest that a school funding decision not to fund religious education is presumptively unconstitutional

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[9] Petitioners persist in pressing the Establishment Clause public forum line of cases. Petition, at 20-21. As this Court noted in *Locke,* 540 U.S. at 721 n.3, that line of cases has nothing to do with school funding issues. Moreover, in none of those cases was the Court presented with rationales other than an asserted misapplication of the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent,* 454 U.S. 263 (1981).

because it is not religiously neutral, and that *Locke* did not resolve that issue. Petition, at 24-25; *Amici* Brief of Texas and Alabama, at 2-3, 8-19; *Amicus* Brief of Florida Governor, at 11-27. *Locke*, however, specifically did so. Petitioner there "contend[ed] that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* [508 U.S. 520 (1993)], the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality." *Locke*, 540 U.S. at 720 (footnote omitted). The Court then set forth the criteria and analytical framework to determine if animus existed where a state chose not to fund religious education.

Although petitioners and *amici* assert that *Locke's* reasoning is limited to post-secondary educational training of clergy, Petition, at 20-24, *Amici* Brief of Texas, at 2-3, there is nothing in that decision even hinting that the underlying analysis is so bounded. Indeed, a dissenter specifically recognized that the decision applied broadly. *Locke*, 540 U.S. at 734 (Scalia, J., dissenting) ("Today's holding is limited to training the clergy, but its logic is readily extendible.") The Court set forth the applicable test for a state decision not to fund religious education, and then applied it to the facts and circumstances of that case, which happened to deal with scholarships and a degree in devotional theology. In support of its reasoning, the majority relied upon cases involving elementary and post-secondary school funding. *Locke,* 540 U.S. at 718-19. Thus, it is clear that the balance, or "play in the joints,"

established by *Zelman* and *Locke* applies to all levels of education.[10]

Regarding the application of *Locke* to determine whether animus exists here, petitioners do not even argue that there is a problem with respect to the SJC's application of the three factors identified by the Court to analyze that issue. (App. 27). In particular, here, as in *Locke,* there are no sanctions against petitioners based upon their religion; rather, petitioners simply have chosen not to avail themselves of the government benefit of a publicly funded nonreligous education. The petitioners attempt to take the SJC to task for its review of the history of section 2951(2), and suggests that history evinces sufficient animus to warrant a conclusion that their Free Exercise rights have been violated. As succinctly, and correctly, found by the SJC:

> The fact that after *Zelman* the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue

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[10] Petitioners also suggest that the Court should grant certiorari in the matter because *Locke* can be distinguished due to the difference in the amount of money provided in the Washington scholarship system as compared to that in the Maine tuition program. Petition, at 29. The Court did not mention the amount of money as being significant and, indeed, noted that the student could use the scholarship to "pursue a secular degree" and use his own money to obtain a religious one. *Locke*, 540 U.S. at 721 n.4. Whether the Washington scholarship funded a complete or partial education was irrelevant to the Court's analysis. Here, similarly, petitioners can avail themselves of a publicly funded nonsectarian secondary school education for their children just like all other Maine students, and use their own money to obtain a religious one.

> the religious school exclusion. *Locke* recognizes that states have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.

(App. 27-28). Petitioners' historical argument is that the Legislature passed section 2951(2) because the Attorney General and the Legislature itself made a mistake by misreading the then-applicable precedent. No religious animus arises from such a "mistake," and petitioners point to nothing in the Attorney General's opinion or the legislative record indicating otherwise.

Petitioners' arguments regarding anti-Catholic prejudice in the mid-19th century are irrelevant and internally inconsistent,[11] and petitioners have pointed to no record or evidence of such animus in 1982 or in 2003. For that matter, no Blaine Amendment passed in Maine even in the

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[11] Petitioners' arguments on this point are confusing and contradictory. Petition, at 2-3, 24-27. Petitioners seek to distinguish *Locke* because, they argue, there the Washington provision had existed as part of a long tradition not to fund religious education while Maine had a long tradition of funding religious education until 25 years ago. Apparently, according to petitioners, the lack of a "long tradition" of *not* funding religious education somehow prevents Maine from ever changing its policy. However, there is nothing in *Locke* or *Zelman* that suggests newer actions regarding funding of religious education are somehow more suspect because they were made in the 20th or 21st century, rather than in the 19th. Each action, whether it be to fund or not to fund religious education, is evaluated based on its own merits whenever it occurs, under *Zelman* and *Locke*, respectively.

At the same time, however, petitioners suggest that Maine has a long tradition of discriminating against Catholics in particular, in support of petitioners' claim of animus in Maine. If Maine funded Catholic schools until 25 years ago, it is hard to see what kind of anti-Catholic animus existed in Maine. Petitioners' incongruous use of the facts here highlights why certiorari is inappropriate.

19th century. Moreover, petitioners' asserted history of religious prejudice has not foreclosed the use of public funds for textbooks and busing at sectarian schools today,[12] nor prevented the Legislature from providing exemptions for such schools from a number of otherwise applicable statutes, including ones dealing with unemployment insurance and discrimination. In the end, petitioners point to no facts supporting the conclusion that animus against religion motivated the passage of section 2951(2) or that any such animus motivated the Legislature to retain it after *Zelman*.

Finally, the SJC's decision fully comports with the clear distinction this Court has drawn between interference with a protected right and state encouragement of an alternative activity. The government is accorded great discretion in funding decisions, even where it chooses not to fund an individual's exercise of fundamental rights. *Maher v. Doe,* 432 U.S. 464, 476-77 (1977) (woman's fundamental right to an abortion did not bring with it a fundamental right to have an abortion publicly funded, even when other family planning was publicly funded); *see also National Endowment of the Arts v. Finley*, 524 U.S. 569, 596 (1998) (denial of participation in a subsidy scheme does not as a general rule infringe on fundamental right of free speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upheld federal regulation prohibiting the use of Title X funds at clinics for abortion advocacy). Indeed, in *Locke*, the Court described the issue as "[t]he State has merely chosen not to fund a distinct category of instruction," 540

[12] Because the Court in *Locke* considered the "entirety" of the scholarship program, 540 U.S. at 724, so too it would be proper to consider the "entirety" of Maine's school funding program.

U.S. at 721, which is exactly what the Maine Legislature has done here.

C. The Maine Public Education System is Unique.

Maine's public educational system, as described above, is unique in how it utilizes public funds directly to pay for its children's public education. The funding occurs in several ways: publicly-operated schools, contracts with publicly-operated or private nonsectarian schools, and tuition payments to nonsectarian schools. The use of private nonsectarian schools, obviously, is intended to provide educational opportunities emulating that available in publicly-operated schools, which is generally perceived to be free "secular instruction." *See West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943) ("Free public education, if faithful to the ideal of secular instruction . . . will not be partisan or enemy of any . . . creed.") In other words, all students in Maine, no matter where they live, can avail themselves of a publicly funded, nonsectarian education, by means of three funding schemes.

Neither petitioners nor *amici* refer to any similar state educational scheme, nor describe how *Anderson* prevents any state from choosing, if it believes the circumstances warrant, to fund religious education pursuant to the guidelines of *Zelman.* Moreover, and importantly, there is nothing constitutionally suspect about a system that seeks, in a variety of ways, to provide a "public school" education utilizing private schools that more closely resemble that type of nonsectarian education.

This statutory scheme is not founded upon a state Blaine Amendment, so this matter, like *Locke,* does not

bring that provision into play. *Locke,* 540 U.S. at 723 n.7. Moreover, in *Locke* the Court had before it a provision that prevented both direct and *indirect* funding, while in Maine *indirect* funding is permitted for textbooks and busing at religious schools. Therefore, neither a Blaine Amendment nor a statute banning all public support of sectarian schools is involved here. In Maine, while section 2951(2) does not presently allow for the direct use of public dollars for religious education, efforts to repeal that statute can be made, as several petitioners and their counsel attempted in 2003, without the bar of a Blaine Amendment. And, as noted, Maine's public education system does permit public funding of busing and nonreligious textbooks for sectarian schools. Petitioners do disservice to their cause by waving a 19th century flag of anti-Catholic prejudice at turn of the 21st century governmental actions.

D. The SJC's Reliance Upon Excessive Entanglement as a Rationale is Correct.

Petitioners claim that excessive entanglement as a matter of constitutional law cannot support a legislature's policy decision not to publicly tuition religious education.[13] Petition, at 16-20. The SJC found that:

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[13] Petitioners persist in characterizing their goal as *indirect* funding of religious schools. The public funds are paid directly from the school administrative unit to the school. The expenditure of public funds as requested by petitioners would be a *direct* payment to a sectarian school from governmental units to cover the *direct* cost to religiously educate the petitioners' children that petitioners themselves would otherwise have to pay. (SJC App. 95). That is how the petitioners themselves view it. (SJC App. 96, 98, 99, 104, 105). Petitioners want the State and towns to pay for their children's religious education and

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> [C]onflicts could result in significant entanglement of State education officials in religious matters if religious schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools. This concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2).

(App. 30-31). *See also Eulitt,* 386 F.3d at 355.

It is perfectly rational for a court to consider such entanglement issues in the context of an Equal Protection challenge based upon asserted religious discrimination. Concerns over excessive entanglement are nothing novel in the religious funding setting. The Court has already recognized the constitutional significance of those considerations in the context of Establishment Clause challenges. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). There is no reason entanglement likewise cannot form a rational basis in the Equal Protection context. No case has held otherwise, and, in particular, petitioners identify no case conflicting with *Anderson* and *Eulitt* on this point.

The SJC's decision is fully consistent with those of the Court according substantial deference to a legislature's policy choices regarding education. *San Antonio Independent Sch. Dist. v. Rodriguez,* 411 U.S. 1, 42 (1973) ("Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' The very complexity of the problems of financing and managing a statewide public school

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religious books. (App. 105). It is hard to imagine a more direct form of funding.

system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect.") (citations omitted)); *id.*, at 60 (upholding the Texas system because it "does not rest 'on grounds wholly irrelevant to the achievement of the State's objective.'") (Stewart, J., concurring). In this context, considerations of entanglement regarding, *inter alia,* admissions policies, hiring policies, financial audits, and oversight of instruction of a religious institution are certainly issues upon which a Legislature may base its decisions.

Finally, petitioners argue that the SJC's decision conflicts with *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481 (1986) and *Zelman* regarding the SJC's use of excessive entanglement in the context of the Equal Protection challenge. Petition, at 12, 18. The Court in *Zelman* did not address the entanglement issue at all in any context as it was not raised, and in *Witters,* 474 U.S. at 489 n.5, the Court specifically "decline[d] to address the 'entanglement' issue" because the court below had not addressed it. Where *Witters* and *Zelman* did not deal with the issue, it is hard to see how there is a conflict.

CONCLUSION

For the reasons discussed above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 06-132

IN THE

Supreme Court of the United States

KEVIN AND JULIA ANDERSON, *et al.*,
Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION OF PRIVATE PARTY RESPONDENTS KEN WILLIAMS, *ET AL.*

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IN THE

Supreme Court of the United States

No. 06-132

KEVIN AND JULIA ANDERSON, *et al.*,
Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION OF PRIVATE PARTY RESPONDENTS KEN WILLIAMS, *ET AL.*

Respondents Ken Williams, *et al.*, defendants-intervenors in the court below, submit this Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

The petition for certiorari presents two questions, neither of which warrants review by this Court.

The first question concerns the proper application to this case of *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)—which, in petitioners' terms, "teaches" that when a legislature's "true reason" for enacting a statute is "known," other conceivable justifications for the statute cannot be relied upon to defend the statute against an Equal Protection Clause challenge. The question arises, according to petitioners,

because the "true reason" why the 1982 Maine Legislature initially adopted the challenged 20-A M.R.S.A. § 2951(2) prohibition on the public funding of tuition payments to religious private schools is "known"—*viz.*, compliance with the Establishment Clause—but the Maine Supreme Judicial Court nonetheless invoked other justifications in upholding § 2951(2) against petitioners' Equal Protection Clause challenge.

Petitioners' first question is not properly presented, because, as the Maine Supreme Judicial Court understood, this case does not turn on an Equal Protection Clause analysis of the 1982 Maine Legislature's action. Following the decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and in the light of *Zelman*'s Establishment Clause holding, the 2003 Maine Legislature acted to maintain § 2951(2)'s prohibition in force. And, it is Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition that gave rise to this lawsuit. The Equal Protection Clause analysis in this case thus centers on the rationality of Maine's post-*Zelman* decision to maintain § 2951(2)'s prohibition, and not on the rationality of the 1982 Legislature's adoption of that prohibition in the first place. *See infra* pp. 3-5.

The second question presented by petitioners is whether the Maine Supreme Judicial Court erred in ruling that Maine's use of public funds to pay for certain students to attend secular—but not religious—private schools passes constitutional muster. The court below did not err, and there is nothing about its ruling that warrants the exercise of this Court's certiorari power.

The Maine Supreme Judicial Court's ruling is not in conflict with the ruling of any other court; to the contrary, the decision below follows the lead decision of the First Circuit in *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), upholding the constitutionality of the § 2951(2) prohibition. And, both the *Eulitt* decision and the

decision below are firmly grounded in this Court's constitutional jurisprudence. *See infra* pp. 6-9.

For these reasons, which we develop below, the petition for certiorari should be denied.

I.

Prior to 1982, Maine provided public funds to pay the tuition for certain students—specifically, those who resided in communities that did not operate their own public elementary and/or high schools—to attend secular or religious private schools. In 1982, in response to a 1980 Maine Attorney General's Opinion that the public funding of tuition for students to attend religious private schools was contrary to the Establishment Clause, the Maine Legislature enacted 20-A M.R.S.A. § 2951(2), which provides that "[a] private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Pet. App. at 64.

In their Statement of Facts, petitioners discuss the 1980 Attorney General's Opinion and the action that the 1982 Maine Legislature took in response to that Opinion at length, and cite these events as the reason why Maine *currently* excludes religious private schools from its tuition payment program. But petitioners' Statement of Facts is less significant for what it says than for what it fails to say: nowhere in this 5-page segment of the petition do petitioners even mention the fact that lies at the heart of this case—specifically, the action taken by the 2003 Maine Legislature in response to this Court's decision in *Zelman v. Simmons-Harris*, *supra*.[1]

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[1] This action is mentioned by petitioners only in passing in their discussion of the trial court's decision in the "Proceedings Below" section of the petition. *See* Pet. at 7-8 & n.16.

In the immediate aftermath of *Zelman*—which held that an Ohio statute that provided public funding for tuition payments at both secular and religious private schools in Cleveland did not run afoul of the Establishment Clause—a bill was introduced in the 2003 Maine Legislature to repeal § 2951(2), and thereby permit public funding of tuition at religious private schools. That bill was brought to the floor of the Legislature. After a full and spirited debate in which a wide array of divergent viewpoints were expressed, the bill was defeated, *see* Pet. App. at 6, and the § 2951(2) prohibition was maintained.

Given the 2003 legislative events, the *Weinberger v. Wiesenfeld* question that petitioners present simply disappears from this case. Assuming *arguendo* that petitioners are correct in asserting that the "true reason" why the 1982 Maine Legislature initially enacted § 2951(2) is "known"—*viz.*, compliance with the Establishment Clause—petitioners' reliance on that fact is misplaced. The reason why the 1982 Maine Legislature did what it did some twenty-five years ago is *not* the reason why religious private schools are excluded from the state's tuition payment program today. Religious private schools are excluded today because the 2003 Maine Legislature—acting after this Court's decision in *Zelman*, and in the light of *Zelman*'s Establishment Clause holding—made an affirmative decision to maintain the § 2951(2) prohibition.[2]

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[2] We emphasize that the 2003 Maine Legislature did not simply allow § 2951(2)'s prohibition to remain in force after *Zelman*, but rather made an affirmative decision to maintain that prohibition—thus distinguishing the situation here from those situations in which mere legislative inaction properly is treated as inconsequential. As the trial court below aptly put it:

> Although the court recognizes that "unsuccessful attempts at legislation are [often] not the best of guides to legislative intent," there are in fact circumstances where legislative "nonaction is

Thus, the determinative legal question presented and decided first in *Eulitt v. Maine Department of Education, supra,* and then in this follow-up case, is whether Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools is proper under the Religion Clauses and the Equal Protection Clause of the Constitution. Why the 1982 Maine Legislature adopted the § 2951(2) prohibition in the first place does not bear on that question. While petitioners would have § 2951(2) viewed in a 1982 historical vacuum, the Maine Supreme Judicial Court correctly considered the statute's constitutionality on the full, ongoing legislative record.

In sum, because the 2003 Maine Legislature after *Zelman* chose to maintain the § 2951(2) prohibition, the outcome of this case does not turn on the Equal Protection Clause rationality of the 1982 Maine's Legislature's initial adoption of § 2951(2) more than twenty years before *Zelman.* That being so, the first question presented by petitioners respecting the proper methodology under *Weinberger v. Wiesenfeld* for making such an Equal Protection Clause rationality determination is not properly presented in this case, and is not fit for this Court's review.[3]

> significant" and may be considered by a court seeking to discern intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). In situations where, as here, the Legislature has not simply declined to act or passively acquiesced in shifts in statutory application but has, instead, taken affirmative steps to reaffirm a statute's function and to articulate informed, purposeful reasons for doing so, a court should not discount such clear indicators of legislative intent. *See id.* [Pet. App. at 58 (bracketed language in original).]

[3] In reviewing the complete legislative history of § 2951(2), the court below expressly noted that the rational justifications supporting the 2003 Maine Legislature's action to maintain the prohibition are "not inconsistent with or contrary to" the asserted "actual rationale" for the 1982 Legislature's adoption of the prohibition, Pet. App. at 29, which we submit reflects a proper reading of *Weinberger v. Wiesenfeld.* And,

II.

In *Eulitt v. Maine Department of Education, supra*, the First Circuit—taking full account of this Court's decisions in *Zelman* and *Locke v. Davey*, 540 U.S. 712 (2004)—ruled that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools passes constitutional muster. In the instant case, the Maine Supreme Judicial Court followed suit, ruling that "[a]fter *Zelman*, the State [of Maine] may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* [*v. Davey*] and *Eulitt* hold that [Maine] *is not compelled to do so*." Pet. App. at 31 (emphasis added).

These consistent reinforcing lower court decisions—and the absence of any even-arguably conflicting lower court decision—cut deeply against petitioners' contention that this Court's review is warranted here. And, petitioners' last-ditch argument in favor of such review—that the First Circuit and the Maine Supreme Judicial Court have in their respective decisions "taken [*Locke v. Davey*] out of [its factual] context," Pet. at 24, thus improperly "broadening [its] application," *id.* at 27—is totally without substance.

The First Circuit in *Eulitt* took the lead in rebutting petitioners' assertion that *Locke v. Davey* stands for nothing more than the proposition that a state may constitutionally "refu[se] to fund students training for religious vocations." Pet. at 24. And, the Maine Supreme Judicial Court followed

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petitioners' reliance on the Ninth Circuit's decision in *Christian Science Reading Room v. City of San Francisco*, 784 F.2d 1010 (9th Cir.), *as amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987), in an effort to bolster their first question presented is in any event misplaced. Unlike the situation in this case, the challenged policy in *Christian Science Reading Room* was not reconsidered and reaffirmed in the light of intervening legal developments under the Establishment Clause.

Eulitt's lead in its decision below. *See* Pet. App. at 6, 20-22, 26-27, 28, 31. For clarity's sake, we therefore outline the salient points made by the First Circuit, and seconded by the Maine Supreme Judicial Court, in this regard.

The *Eulitt* court began its constitutional analysis of the matter at hand by noting that, under *Locke v. Davey*, "the Free Exercise Clause provides the primary framework for assessing religious discrimination claims." 386 F.3d at 354. The *Eulitt* court added:

> *Davey* confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity. . . . The fact that the state cannot interfere with a parent's fundamental right to choose religious education for his or her child does not mean that the state must fund that choice. *Cf. Maher v. Roe*, 432 U.S. 464, 475-77 (1977) (explaining that the fundamental right to abortion does not entail a companion right to a state-financed abortion). [386 F.3d at 354-55.]

Thus, the *Eulitt* court continued, "[t]he appellants['] ['attempt'] to cabin *Davey* and restrict its teachings to the context of funding instruction for those training to enter religious ministries . . . is unpersuasive." 386 F.3d at 355. Rather, *Locke v. Davey* stands "more broadly" for the proposition that a state's decision to fund secular education and not to fund its religious education equivalents runs afoul of the Free Exercise Clause only if that decision "is motivated by religious animus." *Id.* The non-funding-of-religious-education decision that § 2951(2) embodies "passes that [Free Exercise Clause] test with flying colors," the *Eulitt* court held, inasmuch as § 2951(2) does not impose the kind of

burdens on religious adherents that would be suggestive of "anti-religious animus" on Maine's part. *Id.*[4]

From that predicate, the *Eulitt* court went on to hold that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition on the public funding of tuition payments to religious private schools is subject to the normal Equal Protection Clause rational basis test, under which the burden lies with the challenger to "rule out every plausible rationale that might support the law at issue." 386 F.3d at 356.[5] And, the *Eulitt* court held that Maine's post-*Zelman* maintenance of § 2951(2)'s prohibition easily passes that test, inasmuch as it is supported by several such plausible rationales identified in the legislative history of the bill to repeal § 2951(2)—"includ[ing]," but not limited to, "Maine's interests in concentrating limited state funds on its goal of providing secular

---

[4] "Maine's decision not to extend tuition funding to religious schools," the *Eulitt* court elaborated, "does not threaten any civil or criminal penalty. By the same token, it does not in any way inhibit political participation. Finally, it does not require residents to forgo religious convictions in order to receive the benefit offered by the state—a secular education." 386 F.3d at 355. The *Eulitt* court then added: "If more were needed—and we doubt that it is—*Davey* recognized that states are not required to go to the brink of what the Establishment Clause permits. . . . [Thus], the mere fact that a hypothetical program in which Maine extended tuition funding to parochial schools might comport with the Establishment Clause [under *Zelman*] would not support a presumption that religious hostility motivated [Maine's] decision not to adopt such a scheme." *Id.* at 355-56.

[5] Tellingly in this regard, there are no grounds for contending—and petitioners do not contend—that it is possible to discern from the legislative history of the bill to repeal § 2951(2) a single "true reason" for the 2003 Maine Legislature's decision to maintain § 2951(2)'s prohibition rather than repeal it. To the contrary, petitioners recognize, as they must, that the supporters of § 2951(2) offered a variety of explanations for maintaining the prohibition after *Zelman*. *See* Pet. at 8 & n.16. Individually, and certainly collectively, those explanations easily provide a rational basis for the 2003 Legislature's action.

education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities)." *Id.*

Echoing *Eulitt*, the Maine Supreme Judicial Court likewise held that "the State has supplied a reasonably conceivable set of facts that establish a rational relationship between the statute and a legitimate government interest in avoiding excessive entanglements with religion." Pet. App. at 31.

Contrary to petitioners' assertion, it is thus clear that the constitutional rulings of the First Circuit in *Eulitt* and the Maine Supreme Judicial Court in the instant case are entirely in line with and faithful to this Court's constitutional jurisprudence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VANDERWERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

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ARGUMENT

In seeking to avoid addressing the issue of whether the court below properly applied this Court's decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), Respondents Ken Williams, et al., argue that *Weinberger* is simply inapplicable because in 2003 the Maine Legislature rejected a bill designed to remove 20-A M.R.S.A. § 2951(2). They seek to rely on statements made by legislators favoring rejection of the legislation as supplying new rationales for a policy first implemented in 1980 and codified in 1982. Petitioners maintain that reliance on rationales articulated in conjunction with rejected legislation cannot provide a rational basis for legislation passed more than two decades earlier. Neither Respondents nor the courts below have cited to *any* case that properly supports their position.

Petitioners have argued that § 2951(2) violates their Equal Protection, Free Exercise, and Establishment Clause rights by discriminating against families in tuitioning towns who send their children to otherwise eligible religious schools. Prior to a 1980 Maine Attorney General's Opinion, parents in Petitioners' situation received the benefit of tuition payments made to participating religious schools on their children's behalf.[1] The Attorney General concluded (erroneously) that it violated the Establishment Clause for the tuitioning school districts to continue making tuition payments to religious schools. The Commissioner of Education implemented the Opinion for the next school year, 1980-81.

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[1] In fact, parents from Petitioners' school districts benefited from tuition payments made to the exact same two schools to which Petitioners send their children.

The Chairman of the Maine Legislature's Joint Committee on Education, Senator Howard Trotzky of Bangor, had requested the Opinion while his Committee was working on a complete revision of Maine's education laws. Senator Trotzky introduced his Committee's revision in 1982, and it became effective in 1983. Senator Trotzky and other members of the relevant committees assured their colleagues that no substantive changes to existing law were effected by the recodification.[2] Section 2951(2) plainly incorporated the conclusion of the Attorney General's Opinion that the current law had to be read as excluding religious schools, by making explicit a requirement that only nonsectarian schools could receive tuition payments. The only reasonable conclusion one can reach from this history and the language of § 2951(2)[3] is that compliance with the Establishment Clause was *the* reason for the exclusion of religious schools from the program.

Respondents argue that this language and prior history should be ignored and that attention must be focused exclusively on the rationales asserted by individual members of the 2003 legislature who voted to reject corrective legislation. They gloss over relevant aspects of the intervening history of § 2951(2), which place the 2003 legislation in a far different light. They also focus exclusively on the effect of this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), while ignoring the effect of

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[2] See Petitioners' Reply to the State's Brief in Opposition to Certiorari at 6-7, for a fuller discussion of this point.

[3] Section 2951(2) requires that participating schools be "nonsectarian in accordance with the First Amendment of the United States Constitution." The whole text of § 2951 is set out in the Petition for Certiorari ("Pet. Cert.") at App. 64-65.

this Court's earlier decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The decision below is not the Maine Supreme Judicial Court's ("SJC") first consideration of § 2951(2). In *Bagley v. Raymond School Dep't*, 728 A.2d 127, 138 (Me.), *cert. denied*, 528 U.S. 947 (1999), a similar group of parents challenged that section on similar grounds. In the course of rejecting those claims, the SJC opined that § 2951(2) would not survive even rational basis review if it were enacted pursuant to an erroneous interpretation of the Establishment Clause, the only justification the State had advanced for excluding religious schools. The SJC, however, then erred in concluding that § 2951(2) reflected a correct interpretation of the Establishment Clause, *i.e.*, that the Clause prohibited paying tuition for children to attend religious schools chosen by their parents under a religiously-neutral program.

Three years later in 2002, in *Zelman v. Simmons-Harris*, this Court held that religious schools could participate in religiously-neutral school choice programs where it was the free and independent choices of the parents that determined which schools their children attended. Maine parents from tuitioning towns then requested that their districts reinstate the prior practice of paying tuition to religious schools, leading Maine's Commissioner of Education to ask the Attorney General what he should do. In a cursory reply, the Attorney General instructed the Commissioner that until the legislature or a court mandated otherwise the Education Department and school districts had to abide by § 2951(2).[4] In addition to

[4] The reply is found in the Pet. Cert. at App. 66-67.

referring to "significant differences" between the Cleveland program upheld in *Zelman* and Maine's program,[5] he stated that the fundamental difference between *Zelman* and any challenge to § 2951(2) was that while *Zelman* held states are allowed to use vouchers, the issue in Maine was "whether Maine is *required* to fund sectarian education." Despite having noted that the SJC had recently upheld § 2951(2) in *Bagley*, he failed to mention the crucial fact that *Bagley* also said that if the Establishment Clause did not *require* exclusion of religious schools then § 2951(2) lacked a rational basis and violated the Equal Protection Clause.

Frustrated by the refusal of their districts to pay tuition for their children based upon the Attorney General's flawed reply, the Petitioners filed suit in state court against their school districts and the Commissioner.[6] Some months later, and not at the instigation of Petitioners, legislation was introduced to repeal § 2951(2). This legislation failed to pass, with various legislators giving a wide array of reasons for opposing it. Among these reasons were those given in the Attorney General's reply from the year before, including all of the specious ways he sought to distinguish *Zelman*. Several other less wholesome reasons for maintaining the discrimination

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[5] He included "the structure of the school system, the structure of the tuition program, the options available, and the level of payments." Pet. Cert. App. 67. None of the Respondents nor the SJC has ever explained how any of these things legally distinguish the two programs. Petitioners have maintained without contradiction that in fact the Maine program would be perfectly constitutional were parents again allowed to receive the benefit of tuition payments for their children's education.

[6] Shortly thereafter, similarly-situated parents filed a lawsuit in federal court, which resulted in *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004).

were also given, including the costs that would be entailed from treating parents like petitioners the same as other parents in the tuitioning districts,[7] and that all religious groups and schools would have to be treated equally.[8] A number of opponents simply misunderstood the legislation as support for a voucher system, failing to recognize that all the legislation tried to do was allow parents like Petitioners to participate on an equal basis in an *existing* voucher system.[9]

Thanks to the Attorney General's reply, no doubt many legislators agreed with Representative Mills, who stated: "Our system is not constitutionally broke as it currently stands and it is not necessary to fix something that is not broken."[10] His position was seconded by Representative Millett, who actually explained to the House that he was on the committee that added § 2951(2) "in strict concurrence with the Attorney General's recommendations," that it had been upheld in subsequent litigation, and that it needed no change.[11] Obviously, these legislators

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[7] Transcript of House Debate on LD 182 at H-584 (May 13, 2003) (remarks of Rep. Cummings, chairman of the Education Committee) ("Let me start with the most basic [reason]: you can't afford it."); *id.* at H-588 (remarks of Rep. Gagne-Friel) ("We can't afford it"), Joint Exhibit 101 from the App. Below.

[8] *Id.* at H-585 (remarks of Rep. Davis) ("If you open this up, be prepared to open it up thoroughly, because some of those groups, I am sure, will be forming their own schools").

[9] *Id.* at H-584 (remarks of Rep. Cummings) ("we have to believe that children are better supported by public schools with public money"); *id.* (remarks of Rep. Sullivan) ("We need to set policy and say that we support our public schools with taxpayer's money. We don't support private schools, parochial private schools").

[10] *Id.* at H-585.

[11] *Id.* at H-589.

were not intending to supply new rationales for legislation that they did not believe needed any.

When legislation has been successfully passed, in trying to glean the rationale behind it a court can look to a wide variety of sources. The language of the enactment, the structure of the program, the committee reports, and the statements of the sponsors are all fair game. But statements of opponents of legislation are not accorded weight because they have every reason to distort the meaning and purposes of the proposal in order to reject it. What the Respondents urge here is unprecedented: that statements, standing alone, of opponents of legislation that would change an existing statute can supply a new rational basis for the original statute in the course of opposing the change to it. There is no new language to parse, no committee reports, no statements of sponsors, only the bare statements of legislators with a wide array of reasons for opposing a bill.

The sole case relied on by Respondents to support this unprecedented position is *Bob Jones University v. United States*, 461 U.S. 574 (1983), relied on by the trial court below.[12] *Bob Jones* found significance in Congress' failure to enact legislation to overturn a controversial interpretation of the Internal Revenue Code by the IRS and upheld the interpretation. Stating that "ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation," 461 U.S. at 600 (citing cases), this Court found the nonaction significant because "during the past 12 years there have been no fewer than 13 bills introduced to overturn

[12] Brief in Opposition at 4-5 n.2.

the IRS interpretation," *and* because "[t]he evidence of congressional approval goes well beyond the failure of Congress to act on legislative proposals." *Id.* at 601. In particular, this Court emphasized that "Congress affirmatively manifested its acquiescence in the IRS interpretation" when it enacted a related provision of the Internal Revenue Code and favorably referenced a court case upholding the same interpretation the IRS gave the original provision. *Id.*

Bob Jones involved whether congressional inaction could demonstrate acquiescence in an *interpretation* given by the agency Congress charged with interpreting the statute it had passed, where the indicia of acquiescence were overwhelming. Neither factor is present in the case below. The circumstances in *Bob Jones* are a far cry from the use to which Respondents put *Bob Jones*, which is to allow statements made in rejecting a single effort to repeal a statute to supply new *rationales* for upholding it.

The bottom line here is simple. The plain language of § 2951(2) continues to reflect its original purpose, compliance with a flawed interpretation of the First Amendment's Establishment Clause. Nothing done by the 2003 Legislature changed that language and its inherent religious discrimination. It continues to prohibit payment of tuition on behalf of any student attending any school that is not "nonsectarian in accordance with the First Amendment of the United States Constitution," despite the fact the First Amendment does not actually require that schools be nonsectarian in order for their students to benefit from religiously-neutral voucher programs like Maine's tuitioning program. The constitutionality of § 2951(2) must turn on the sole motivation for its enactment, compliance with the Establishment Clause.

Respondents have sought to avoid the problem they face under *Weinberger* by using *Bob Jones* to refocus this Court's attention on the red herring of the 2003 legislation. This case does in fact fall within the narrow confines of *Weinberger* because the rationale for creating § 2951(2) is actually known, a mistaken interpretation of the Establishment Clause. Such an interpretation cannot satisfy even the rational basis test.[13]

CONCLUSION

For the reasons discussed above and in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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[13] Petitioners do not concede that under *Locke v. Davey* the appropriate test is rational basis scrutiny, only that that question need not be reached if it is recognized that § 2951(2) cannot meet either level of scrutiny, rational basis or strict scrutiny. Petitioners have shown in their Petition for Certiorari and Reply to the State Defendants' Brief Opposing Certiorari that the decision below misapplies *Locke* and will not repeat those arguments here.

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In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

REPLY TO OPPOSITION BRIEF OF THE STATE DEFENDANTS

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ARGUMENT

In opposing the petition for certiorari in this case Maine has pursued a strategy of obfuscation, deliberately obscuring the context in which the state introduced religious discrimination into a previously neutral statutory scheme. It has sought to muddy the water so that this Court will not confront the fact that Maine currently discriminates against families who choose religious schools for their children based upon a 25 year-old misunderstanding of the Establishment Clause. That misunderstanding arose in a 1980 Opinion of the Maine Attorney General, was implemented by the Maine Commissioner of Education for the 1980-81 school year, and was incorporated by the legislature into a comprehensive recodification of the Maine education statutes passed in 1982. Tacitly conceding that a mistaken interpretation of the Establishment Clause cannot supply even a rational basis for a statute that on its face discriminates on the basis of religion, the state seeks to avoid the conflict with decisions of this Court and other appellate courts that have held that when the actual rationale behind a statute is known speculative rationales should not be considered. Viewed in the proper context, no reasonable person can conclude that Maine excluded religious schools from petitioners' choice of schools for any reason other than a belief that such action was required to comply with the Establishment Clause.

Moreover, despite respondents' protestations that the decision below of the Maine Supreme Judicial Court ("SJC") is a simple application of this Court's recent decision in *Locke v. Davey*, 540 U.S. 712 (2004), and thus unworthy of this Court's attention, the decision is in fact a radical expansion of the narrow *Locke* decision into a sweeping carte blanche for religious discrimination. While *Locke* is replete with language limiting it to vocational training for the ministry and emphasizing that the program involved allowed students to attend religious colleges and take devotional religion courses, the decision below reads *Locke* and the Free Exercise and Establishment Clauses as permitting Maine to exclude all religious

schools and religious courses from parents choices. Far from remaining within *Locke*'s "play in the joints," the decision below dismembers the federal Religion Clauses.[1]

I. Respondents' Efforts To Avoid the *Weinberger v. Wiesenfeld* Question Presented in the Petition Fail.

The core of Respondents' argument for avoiding the implications of Maine's reliance on a mistaken understanding of the Establishment Clause to justify the removal of religious options from the tuitioning program is their claim that "there is not a thing in the legislative record indicating that the Legislature considered only the Establishment Clause." Respondents' Brief in Opposition (hereinafter "Opp. Br.") at 14. The best that can be said for this argument is that it is disingenuous, because the entirety of the circumstances, to say nothing of the plain language of the amended statute, show beyond the shadow of a doubt that it was the Attorney General's flawed Opinion in 1980 that resulted in the exclusion, with the Legislature subsequently incorporating that Opinion in the course of recodifying Maine's education statutes two years later. It is in fact the Respondents who have failed to provide even a scintilla of evidence that the following narrative and context is not completely accurate.

For a hundred years prior to the 1980-81 school year, families in petitioners' exact situation who sent their children to eligible religious high schools received the benefit of tuition payments made on behalf of their children.[2] Such

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[1] The First Circuit has also misread *Locke* as allowing unfettered discrimination against families selecting religious schools. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004).

[2] Respondents' description of Maine's educational history is riddled with errors and mischaracterizations. Most prominent among them are the failures to acknowledge both that Maine had a long history of aiding the creation of religious private schools (at least Protestant ones) through the gift of state lands, a practice begun as part of Massachusetts and continued and encouraged after statehood in 1819 by the Maine Constitution's education article (art. VIII, pt.1, §1), and that its

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payments were routine, and there is no indication of any sort that excessive entanglement of the state with religion occurred. In 1979, however, while preparing a recodification of all of Maine's education laws, Senator Howard Trotzky, the chairman of the Joint Standing Committee on Education,[3] requested a legal opinion from the Maine Attorney General on whether it was legal to pay tuition to religious schools under several Maine statutes, then under review. The Attorney General issued a formal opinion concluding that the Establishment Clause prohibited Maine from contracting for school services with religious schools, an arrangement whereby a private high school serves as the de facto public school for the district.[4] This conclusion is plainly correct, but the Opinion went awry by failing to separately analyze the very different arrangement presented by the tuitioning program, in which parents independently choose a school for their children to attend, and by concluding that the Establishment Clause prohibited making tuition payments to religious schools under that program as well.[5] At that time, no decision of

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public schools were nondenominationally Protestant in orientation, with mandatory Bible reading, hymn singing, prayer, and baccalaureate exercises routine well into the Twentieth Century. Petition for Certiorari (hereinafter "Cert. Pet.") at 3 n.5 and sources cited therein.

[3] In an obvious effort to obscure the relationship between the Attorney General's 1980 Opinion and its subsequent incorporation into the recodification, Respondents refer to the chairman as simply "a Maine legislator," Opp. Br. at 3.

[4] Under such an arrangement all students from the contracting town must attend the private school with which the town's school board contracts. For a case from Maine involving such an arrangement, see *Logiodice v. Trustees of Maine Central Institute*, 296 F.2d 22 (1st Cir. 2002).

[5] Respondents persist in mischaracterizing this relationship as one of "direct public funding" of religious schools, Opp. Br. at 2, and of "direct use of public dollars for religious education." *Id.* at 26. Indeed, despite Maine's long history of providing grants of state lands directly to the founders of Protestant private schools, see n.2, Respondents state that "it is hard to imagine a more direct form of funding" than paying tuition to sectarian schools to educate petitioners' children by covering costs "the petitioners themselves would otherwise have to pay." Opp. Br. at 26-27 n.13. The beneficiaries of Maine's land grants were the schools,

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this Court forbade paying tuition to religious schools under a system of true private choice,[6] while two well-known decisions of this Court supported a finding of constitutionality. *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). The Attorney General concluded that the various statutes involved had to be read as *sub silentio* excluding tuition payments to religious schools under both the contract and tuitioning statutes, despite their facial inclusion of religious schools and the long history of so interpreting the statutes.[7]

At the end of his Opinion the Attorney General stated his conclusion "that the practice of using public funds to send students to [sectarian] schools is unconstitutional."[8] Even before the Opinion was issued, however, the Record shows that the Attorney General met with the principal of a Catholic high school enrolling many students under the

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where as the beneficiaries of Maine's tuitioning program are the parents and children and not the schools that provide them an education in exchange for tuition payments, whether those payments are made by the parents or their school districts. When a government buys a service from a private provider of services the payments it makes are not "direct funding" of that provider, unless there is an element of gift to the service provider in the transaction.

[6] The primary case relied upon by the Maine Attorney General in his Opinion for the conclusion that districts could not pay tuition to religious schools pursuant to exclusive contracts specifically reserved judgment on the question of whether a program that "involv[ed] some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.38 (1973). Before the exclusion of religious schools, Maine's tuitioning program epitomized such a program, even more so than the Cleveland voucher program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which distinguished *Nyquist* on this very basis. *Id.* at 661.

[7] The Attorney General was well aware that districts were currently paying tuition for students attending religious schools. See Cert. Pet. at App. 74 n.2.

[8] Cert. Pet. at App. 97.

tuitioning system to tell him that such payments would be forbidden in the future.[9] The Record also shows that the Commissioner of Education applied the Opinion in the immediately following school year, 1980-81.[10]

Shortly thereafter, in 1982 Chairman Trotzky presented the recodification of Maine's education laws to the legislature. Section 2951(2) contained a new requirement never before found in the Maine code, and states that a private school can only be approved to receive public funds for tuition purposes if it "[i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Having recently received the Attorney General's Opinion concluding the pre-existing statutes had to be interpreted to exclude tuition payments to sectarian schools, the conclusion is inescapable that the new language was added to make the new code correspond to the already altered practice of excluding sectarian schools. More importantly, the plain language of the new provision disqualifying otherwise eligible private schools that are sectarian explicitly references the First Amendment, an unmistakable reference to the Attorney General's legal conclusion to the same effect. Senator Trotzky, of course, was well aware that the change had already been implemented, and had already forced the closure of the Catholic high school in Bangor.

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[9] Affidavit of Joseph Sekera, ¶ 8, Joint Exhibit 4 to the Joint Stipulation of Facts, Tab 5 of App. Below. The Opinion forced the school to close. Cert. Pet. at 3-4. The Respondents softpedal this closure by saying the school "successfully transformed itself into a nonsectarian one." Opp. Br. at 4. Because he represented the Bangor area, Senator Trotzky was well aware of the effects of the Opinion he had solicited on John Bapst, see "Bangor Catholic School to Shut Down, Portland Press Herald, April 30, 1980, at 13; and David Himmelstein, "Only $2 Million Miracle Could Keep Bapst Going, Maine Sunday Telegram," May 4, 1980, at A14, and is quoted as regretting that his request for the Opinion was causing the school to close.

[10] Affidavit of James Watkins, Jr. ¶ 29, Joint Exhibit 5 to the Joint Stipulation of Facts, Tab 5 of App. Below.

Respondents are indeed correct that the legislative history of the 1982 recodification by Maine Legislature does not indicate that the Legislature "considered only the Establishment Clause." That, however, is not the relevant fact. The relevant fact is that the Maine Legislature *intended absolutely no substantive change in the statutes.* There was no need for them to consider any rationales for the new provision or any other, because the purpose of the recodification was solely to reflect existing law and *not* to make new law. On this point the legislative history is *unequivocal* and *utterly consistent.*

As chairman of the Joint Standing Committee on Education, Senator Trotzky introduced and defended the recodification in the state Senate. His remarks left no doubt that the education committee intended that the recodification make no substantive changes whatsoever to existing law, but merely systematize and update the hodge-podge of current education laws.[11] His House counterpart, Representative Connolly, chairman of the House Education Committee, stated the same thing in the other chamber: "the Education Committee [meant] to make [no] substantive changes at all in this recodification."[12] Representative Thompson, another member of the House Education Committee, stated that all members of the committee agreed that the recodification makes no substantive changes.[13] Representative Murphy, also a member of the House Education Committee, assured the House that during the drafting process any proposed change that any member of the public thought would possibly change meaning was left in its original language.[14] Indeed, when the issue of how § 2951(2) came to be in the statutes became a bone of contention during the 2003 debate to repeal it, yet another member of the House Education

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[11] 1982 Me. Leg. Rec. 483-84, 533-34 (Senate, March 31, 1982 and April 1, 1982).

[12] *Id.* at 315, 539-40 (House, March 23, 1982 and April 5, 1982).

[13] *Id.* at 539 (House, April 5, 1982).

[14] *Id.* at 315 (House, March 23, 1982).

Committee from 1982 came forward to explain that the change was "done in strict concurrence with the Attorney General's recommendations" in his Opinion.[15]

In summary, because the legislature was engaged in a recodification of the entire education code, its concern was with accurately reflecting current law and practice, not writing new substantive law. It had no occasion to consider additional rationales for taking away parents' rights to choose religious schools when excluding such schools from participation in the tuitioning system, because that was not its mission. By 1982 it accepted as a given, a fait accompli, the exclusion of such schools pursuant to the 1980 Attorney General's Opinion and its implementation by the Department of Education. The deed was already done.

Accordingly, because of the particular circumstances and context surrounding the exclusion of religious schools from the tuitioning program, it is clear that the exclusion was a function of the 1980 Attorney General's Opinion and based upon his conclusion that such an exclusion was required by the Establishment Clause. The actual reason for the exclusion is in fact known, and under this Court's decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), it was unnecessary for Petitioners to negate every conceivable justification for the exclusion, whether actually considered or not. As a result, Respondents' reliance on *F.C.C. v. Beach Communications*, 508 U.S. 307 (1993), is misplaced, and the question of whether the SJC's decision below properly applies *Weinberger* is appropriately presented for this Court to review.

II. The SJC's Reliance on Excessive Entanglement as a Rationale Is Inappropriate.

Respondents fault Petitioners for "persist[ing] in characterizing" the program as one of indirect funding of religious schools. Opp. Br. at 26 n.13. In so doing, Respondents

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[15] Transcript of House Debate on LD 182 at H-589 (May 13, 2003) (remarks of Rep. Millett), App. Below at 176.

perpetuate an error from the original 1980 Attorney General's Opinion and from both of the SJC's decisions involving recent challenges to the discriminatory exclusion.[16] This is the failure to properly recognize that even though tuition payments are transmitted directly to schools participating in the tuitioning program, they are of, at most, indirect benefit to the schools. That is nowhere more clearly illustrated than by the situation in which the Petitioners find themselves. They currently pay tuition for their children's education in schools that participated in the program prior to being ejected in 1980. Should petitioners prevail in this lawsuit, the schools will not receive any more tuition than before, but the school districts rather than the parents would be paying the tuition. The parents are the true beneficiaries of the programs, and the true victims of the discrimination based on religion that § 2951(2) represents.

A consequence of the failure of the original 1980 Opinion and of the SJC's decision below to recognize that the parents are the parties directly benefited by the tuition payments is that this failure leads them to believe that the Establishment Clause's concern with excessive entanglement is relevant to evaluating the constitutionality of inclusion of religious schools. In the leading case addressing excessive entanglement, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), relied upon by Respondents,[17] this Court found that a program that provided *institutional* aid to religious schools would have to police such aid to ensure that it did not have the effect of subsidizing the religious aspects of the schools educational program.[18] Programs of

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[16] In addition to the decision below, the SJC addressed this program in *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied*, 28 U.S. 931 (1999).

[17] Opp. Br. at 27.

[18] The aid in *Lemon* is institutional because it went to defray costs for which the institution was responsible, teacher salaries. The *Lemon* program sought to avoid benefiting the religious aspects of the schools by limiting its subsidies to secular subjects only, but this Court found that the pervasive monitoring that would be necessary to ensure that

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true parental choice, however, which Maine's tuitioning program epitomizes, do not have to contain such policing mechanisms, nor did the program contain such mechanisms during the century that religious schools could be chosen. The fact that the SJC and some current legislators may think such mechanisms would be required simply means that they do not understand the correct meaning of "excessive" entanglement. Indirect aid programs upheld by this Court have never contained pervasive monitoring mechanisms. *Everson v. Board of Education,* 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist. No. 1*, 509 U.S. 1 (1993); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

III. The Decision Below Is A Radical Expansion of *Locke*.

Respondents argue that the SJC's application of *Locke v. Davey*, 540 U.S. 712 (2004), is utterly routine. They believe that despite repeated and continual references in the decision to post-secondary vocational education for the clergy, the discussion of the historical background to concerns with vocational education for the clergy, and language stressing the narrowness of the decision, "there is nothing in that decision even hinting that the underlying analysis" is limited to vocational education for the clergy. Opp. Br. at 21. If Respondents and the SJC are correct in their reading that *Locke* extends beyond vocational education for the clergy, then it is clear that this Court has truly created a monster, and given states carte blanche to discriminate against religious education in general.

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no religion was involved in the teaching of secular subjects would excessively entangle the state authorities with the religious schools. Maine's tuitioning program, by way of contrast, defrays costs for which the parents rather than the school are responsible, and requires no such monitoring of the educational program to ensure no religious elements are subsidized.

Throughout this litigation, Petitioners have asked a simple hypothetical, to which they have yet to receive a satisfactory answer. If it would violate the Free Exercise Clause for Maine to refuse to provide tuition payments on behalf of families choosing Catholic schools and only Catholic schools, because that would plainly discriminate against Catholics on the basis of their religion, why does it not also violate the Free Exercise Clause to discriminate against all families selecting religious schools because they have selected a religious school? The SJC's decision below reads *Locke* as authorizing just this sort of generic discrimination against religion and individuals given an otherwise free choice of private or public schools for their children. If this is correct then states may freely exclude students attending religious schools from any general education-related benefit programs, even though such exclusions are not required by the Establishment Clause. If *Locke* has any limit at all, it must not allow exclusion of religious options from a program like tuitioning that would otherwise be the epitome of religious neutrality. Neither the Establishment Clause nor the Free Exercise Clause permit such widespread discrimination against religion. If this Court's "play in the joints" metaphor has any meaning, there must be a limit to how loose the joint can be.

CONCLUSION

Despite Respondents' efforts to confuse the context in which this case arose, the Petition properly presents its two issues for this Court's resolution. Accordingly, Petitioners respectfully request this Court grant their Petition for Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

KEVIN AND JULIA ANDERSON, *ET AL.*, PETITIONERS

v.

TOWN OF DURHAM, MAINE, *ET AL.*, RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

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QUESTION PRESENTED

Whether the Free Exercise Clause requires application of strict scrutiny to a state law that facially discriminates between religious and secular educational options that are functionally equivalent for purposes of the state's secular educational objectives.

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U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey*, http://nces.ed.gov/ surveys/pss (visited Aug. 25, 2006) 9

U.S. Dep't of Education, National Center for Education Statistics, http://nces.ed.gov/fastfacts/display.asp?id=6 (visited Aug. 25, 2006) 10

U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Offender Statistics*, http://www.ojp.usdoj.gov/bjs/crimoff.htm# prevalence (visited Aug. 25, 2006) 6

8 *Wisconsin Policy Research Institute Report* (1995) 10

INTRODUCTION & INTERESTS OF *AMICI CURIAE*

Amici curiae are the nation's leading advocates for the provision of publicly funded educational choice. They file this brief to emphasize the stakes of this case for millions of families that lack the means to provide their children with meaningful educational opportunities, and especially for minority families in the nation's inner cities. Religious schools are often the only non-public-school option for the nation's neediest children. This Court's review is needed to ensure that the Maine courts' misguided interpretation of the Free Exercise Clause is not permitted to stifle the nation's nascent school choice experiment by excluding the very schools most vital to its success. A more detailed statement of interest for each *amicus* is set forth in the Appendix to this brief.[1]

STATEMENT

Since 1879, the State of Maine has provided funding to cover tuition paid by parents whose children must attend private high schools because there are no public high schools in their communities. During the statute's first 100 years, Maine covered tuition for religious and nonreligious high schools alike. In 1980, however, the State's Attorney General issued an opinion stating that allowing religious high schools to participate in Maine's "tuitioning" program violated the Establishment Clause. Op. Me. Att'y Gen. 80-2 (1980). Armed with this opinion, the Maine Legislature amended the tuition law to exclude religious schools: "[a] private school may be approved for the receipt of public funds for tuition purposes only if it * * * [i]s a non-sectarian school." 20-A M.R.S. § 2951(2).

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The sole asserted basis for this exclusion of religious schools from the program—concern that allowing religious schools to receive publicly funded tuition would violate the Establishment Clause—was laid to rest in *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). Still, Maine continues to exclude such schools from state funding. Petitioners—parents who would receive tuition funds but for the fact that their children attend "sectarian" schools—thus brought this lawsuit, contending that denying them reimbursement for choosing religious schools violates the Free Exercise Clause and the Equal Protection Clause.

The Supreme Judicial Court of Maine sustained the tuitioning program. Citing *Locke* v. *Davey*, 540 U.S. 712 (2004), the court deemed it "unnecessary to apply a strict scrutiny analysis" to the statute. Pet. App. 27. The court acknowledged the ordinary rule that laws which facially discriminate against religious persons are "presumptively unconstitutional." *Id.* at 25. Nonetheless, it "read [*Davey*] broadly" to mean that "mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity." *Id.* at 21, 26. In the court's view, Maine's "concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2)." *Id.* at 31. The court rejected petitioners' equal protection challenge for similar reasons. *Ibid.*

SUMMARY OF ARGUMENT

I. The decision below represents a grave threat to the viability of the nation's fledgling school choice experiment. Religiously affiliated schools represent some 77 percent of private schools nationwide, and they are indispensable to genuinely competitive school choice in virtually every community. Even more importantly, religious schools are frequently the only private schools that serve the neediest children in our nation's inner cities. Thus, in limiting the availability of meaningful school choice to those who can afford it without state assistance, the decision below is certain to impose a disproportionately harmful effect on

disadvantaged children, especially racial minorities. This Court's intervention is needed now, to ensure that the prospect of meaningful school choice is not thwarted before it has a chance to succeed.

II. The decision below would be tolerable—though no less unfortunate—if it rested on a proper interpretation of the Free Exercise Clause. But the lower court's doctrinal analysis warrants this Court's review in its own right. Citing *Locke* v. *Davey*, 540 U.S. 712 (2004), the court below ruled that the Free Exercise Clause did not prohibit Maine's policy of discriminating against families who choose an education that—but for its religious affiliation—satisfies every curricular requirement of the State. The court refused to apply the usual rule that facial religious discrimination by a State is unconstitutional unless necessary to serve a compelling interest. Instead, the court reasoned that, under *Davey*, facial discrimination against religious schools is subject to rational basis review unless it is motivated by animus. Pet. App. 25.

The Maine Supreme Judicial Court's interpretation of *Davey* is both incorrect and dangerous. *Davey* sustained Washington's exclusion of "religious education for the ministry" from its scholarship programs solely on the basis that "training for religious professions and training for secular professions are not fungible." 540 U.S. at 721. Because the "denial of funding" was limited to "vocational religious instruction alone," the ordinary "presumption of unconstitutionality" did not apply. *Id.* at 725.

The Court in *Davey* did not begin to suggest, however, that States may discriminate against religious education that *is* similar to that offered in private secular schools. Yet Maine discriminates against religious schools that teach all of the same state-mandated subjects that are taught in secular schools. If allowed to stand, therefore, the decision below will encourage Maine—and the 30-plus States whose Blaine Amendments purport to bar public funding of education provided by religious schools—to con-

tinue discriminating against religious schools without any compelling reason for doing so. This Court should intervene now to prevent that result.

ARGUMENT

Under cover of a discredited view of the Establishment Clause, Maine excludes a class of citizens from a public educational benefit solely because of their religious beliefs. Whether this policy is valid under the Free Exercise Clause is an issue of vital importance to the nation's school choice experiment. In Part I, we demonstrate that the nation's school choice programs are working and on the rise, but that the participation of religious schools—which the decision below threatens—is critical to their success. In Part II, we show that the decision below rests on a misinterpretation of this Court's free exercise decisions—and in particular *Davey*—and that discrimination of the sort that Maine engages in should be subject to strict scrutiny, which it does not satisfy. For all these reasons, the Court should grant review.[2]

I. The Success Of The Nation's Fledgling School Choice Experiment Depends In Substantial Part Upon The Participation Of Religious Schools.

Today, no less than in 1954, "education is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Now, as then, education "is required in the performance of our most basic public responsibilities," and it is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Ibid.* Indeed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Ibid.* In sum, "[t]he grave significance of

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[2] The *amici* support the petition for certiorari on both questions presented, but here address only the second question. See Pet. i.

education both to the individual and to our society cannot be doubted." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 30 (1973) (quotations omitted); see also *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (education is vital to "sustaining our political and cultural heritage").

A. Education Policymakers Face Extraordinary Challenges In Addressing The Plight Of The Nation's Embattled Public Schools.

As this Court is aware, policymakers at all levels of government take this "most important function" seriously, but they face extraordinary challenges. In *Zelman*, the Court sustained a school choice program in Cleveland, Ohio, where the schools were so troubled as to necessitate federal court oversight. 536 U.S. at 644. The education crisis is by no means limited to Cleveland, however, and it is felt most painfully in the nation's inner cities. In the District of Columbia, for example, some 80 percent of public high school students failed standardized tests in basic math skills, and 57 percent failed in reading. And all this despite the fact that per-pupil spending there is the highest in the nation.[3]

The poor condition of inner-city school systems imposes disproportionate harms on racial minorities. On virtually every measure of the National Assessment of Educational Progress, black and Hispanic scores lag behind their white counterparts. In addition, for the class of 2001, only 56 percent of black students and 52 percent of Hispanic stu-

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[3] Susan L. Aud & Leon Michos, *Spreading Freedom and Saving Money: The Fiscal Impact of the D.C. Voucher Program* 3-4 (2006), http://www.cato.org/pubs/wtpapers/dcvouchersrm3cvr.pdf; Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year* 1 (2006), http://www.manhattan-institute.org.pdf/ewp_10.pdf (in 2001-02, "Washington, D.C. public schools spent $15,489 per pupil—substantially more than any other state," but "the District consistently ranks among the bottom of the nation in educational outcomes").

dents graduated from high school with a regular diploma, compared with 78 percent of white students. Thus, roughly half of black and Hispanic students obtain the educational level needed to attend college.[4]

There is a strong correlation, moreover, between high school dropout rates and job prospects—and, consequently, dependence on public assistance. In 2000, 65 percent of black male high school dropouts in their twenties were unemployed. By 2004, the share had grown to 72 percent, compared with 34 percent of white and 19 percent of Hispanic dropouts. Even when high school graduates are included, half of black men in their twenties were jobless in 2004, up from 46 percent in 2000.[5] And when they do find jobs, black men remain twice as likely as whites (and Hispanic men three times as likely) to be employed in jobs requiring no skills. Compared to white women, black and Hispanic women are likewise employed in relatively fewer jobs that require skills, credentials, and a diploma.[6]

In addition, this disparity in educational opportunities may also have an impact on crime rates. Incarceration rates for blacks are twice as high as those for Hispanics and five times higher than the rates for whites.[7] Yet just one additional year of schooling results in a 0.1 percent reduction in the probability of incarceration for whites and a 0.37 percent reduction for blacks. Based on these statistics, even a one percent increase in male high school

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[4] Jay P. Greene, *High School Graduation Rates in the United States* 3 (Black Alliance for Educational Options rev. 2002), http://www.manhattan-institute.org/pdf/cr_baeo.pdf.

[5] Peter Edelman, Harry J. Holzer, & Paul Offner, *Reconnecting Disadvantaged Young Men* (Urban Institute Press 2006).

[6] Harry J. Holzer, *What Employers Want: Job Prospects for Less-Educated Workers* (Russell Sage Foundation 1999).

[7] U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Offender Statistics*, http://www.ojp.usdoj.gov/bjs/crimoff.htm#prevalence (visited Aug. 25, 2006).

graduation rates could make a significant difference in incarceration rates, saving as much as $1.4 billion in prison costs, or about $2,100 per graduate.[8] Needless to say, the job prospects for those who lack skills and credentials, are dependent on welfare, and have criminal records—all disproportionately minorities—are grim.

Facing these systemic problems in public education—and their downstream effects—policymakers increasingly have begun to experiment with various education reforms, including several variations of school choice. Programs in Cleveland, the District of Columbia, and Milwaukee are perhaps best known, but school choice experiments may be found today in several States and many cities nationwide. Policymakers across the country have determined that school choice programs of varying descriptions promise improvements in public and private schools alike, for the benefit of students and parents in every community.

B. Early Indicators Confirm That School Choice Holds Promise For Improving Both Academic Performance And Racial Inequities In Public And Private Education.

Although these school choice experiments are still in the developmental stages, early indicators are promising. According to available data, school choice programs have resulted in improved reading and math scores, fewer disciplinary problems (*e.g.*, cheating and fighting), greater confidence among students, and, not surprisingly, greater parental satisfaction with their children's education.[9]

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[8] Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence From Prison Inmates, Arrests, and Self-Reports*, 94 American Econ. Rev. 155 (2004).

[9] William G. Howell & Paul E. Peterson, *The Education Gap: Vouchers and Urban Schools* (Brookings Institution Press 2002); Patrick J. Wolf, Paul E. Peterson, & Martin R. West, *Results of a School Voucher Experiment: The Case of Washington, D.C. After Two Years* (2001), http://www.innovations.harvard.edu/cache/

Moreover, the data demonstrate that school choice programs have positive effects on both racial and economic integration efforts.[10] For example, a recent analysis of school choice in the District of Columbia concluded that "[o]f those students who used a voucher to attend a private school, 94% are African American. When we consider that the vast majority of students using the vouchers are non-white and that private schools are more racially integrated than the public schools that those children are leaving by having lower concentrations of African-American students, it is clear that the program is likely reducing racial segregation in schooling."[11] As another study concluded: "choice can allow parents not only to move their children from schools that perform poorly, but also from schools that have become racially segregated due to location or economics."[12]

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documents/4991.pdf; Paul E. Peterson & David E. Campbell, *An Evaluation of the Children's Scholarship Fund* (2001), http://www.innovations.harvard.edu/cache/documents/4863.pdf; Jay P. Greene, *A Survey of Results From Voucher Experiments: Where We Are and What We Know* (2000), http://www.manhattan-institute.org/html/cr_11. htm.

[10] Howard L. Fuller & Deborah Greiveldinger, *The Impact of School Choice on Racial Integration in Milwaukee Private Schools* (American Educ. Reform Council 2002), http://www.schoolchoiceinfo.org/data/research/integ0802.pdf; Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (1999), http://www.schoolchoiceinfo.org/data/research/Clevint.pdf.

[11] Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year* 1 (2006), http://www.manhattan-institute.org/pdf/ewp_10.pdf.

[12] Christopher W. Hammons, *The Effects of Town Tuitioning in Vermont and Maine* 21 (Milton & Rose D. Friedman Foundation 2001), http://www.friedmanfoundation.org/resources/mainevermontstudy.pdf.

The benefits of school choice, however, are not limited to *private* schools. For example, the public schools in San Antonio, Texas, which must compete with private schools in a school choice program, outperformed 85 percent of Texas school districts, after controlling for population demographics and local resources.[13] Similarly, a study of school choice in Vermont and Maine—including the program at issue here—found that "as competition increases, standardized test scores also increase. This is true even when controlling for other factors such as per-pupil spending, poverty, and urbanization."[14]

As these preliminary reports indicate, school choice programs represent a promising approach to education reform, and one that is especially attractive to policymakers in disadvantaged communities. These programs already have produced benefits suggesting real hope for the neediest students.

C. Religious Schools Are Indispensable To Meaningful School Choice, Especially At The Outset Of Programs And In The Nation's Inner Cities.

Religious schools play a vital role in the success of any school choice program. Because these schools make up the great majority of all private schools, the success of any school choice program necessarily depends upon religious schools' participation. According to the U.S. Department of Education, more than 77 percent of private schools have a religious affiliation.[15] Whereas 8.4 percent of students

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[13] Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio* 8 (Manhattan Institute 2002), http://www.manhattan-institute.org/html/cb_27.htm.

[14] Hammons, *supra*, at 18.

[15] U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey*, http://nces.ed.gov/ surveys/pss (visited Aug. 25, 2006).

attend church-related private schools, only 2.4 percent attend secular private schools.[16]

An examination of three cities with prominent school choice programs—Cleveland, Milwaukee, and the District of Columbia—confirms the singular importance of religious schools to the effectiveness of school choice. In Cleveland's program, for example, roughly 82 percent of the private schools participating in the program were religiously affiliated, and some 96 percent of the students receiving vouchers used them to attend such schools. See *Zelman*, 536 U.S. at 647. In Milwaukee, available data for 1995 show that 75 percent of private schools had a religious affiliation, and that 76 percent of students participating in the city's school choice program attended religious schools.[17] And in the District of Columbia, of the 63 participating schools in 2004-05 for which religious affiliation could be determined, 66 percent were religiously affiliated.[18] A school choice program that excludes such a high percentage of the market participants is handicapping itself, and badly.

But it is not merely their numbers that make religious schools so important to the success of school choice. The experience of pioneering school choice programs teaches that—especially in the inner cities—religious schools will be most ready to fill the demands of parents, particularly at the outset of the programs. "[A] voucher system that includes religious schools could immediately offer many children a range of new opportunities, but [one] legally

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[16] U.S. Dep't of Education, National Center for Education Statistics, http://nces.ed.gov/fastfacts/display.asp?id=6 (visited Aug. 25, 2006).

[17] 8 *Wisconsin Policy Research Institute Report* 6 (1995); Fuller & Greiveldinger, *supra*, at 6.

[18] U.S. Dep't of Education, *Evaluation of the D.C. Opportunity Scholarship Program*, http://www.ed.gov/rschstat/eval/choice/dcchoiceyeartwo.pdf.

restricted to nonsectarian schools could not, for supply would be quite limited and there would be *nowhere for most kids to go.*"[19] Indeed, as Yale Law Professor Stephen Carter has noted: "a voucher program that omits religious education would leave out most of the parents who most need it." Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 194 (1993).

In Milwaukee, for example, where the nation's first parental choice program was created in 1990, the initial exclusion of religious schools led to a shortage of available private schools. Recognizing the importance of religious schools to the education reform effort, the State expanded the program in 1995 to include religious schools. Only then did the program begin to thrive.[20]

Moreover, religious schools are effective in advancing the educational and social policy objectives of the school choice programs in which they participate. For example, social scientists have noted that Catholic schools promote greater educational attainment for minority children, regardless of background, because they provide a common academic curriculum and high academic expectations.[21] As one scholar has observed, Catholic schools strongly improve educational outcomes for urban minority children,

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[19] John E. Chubb & Terry M. Moe, *Politics, Markets & America's Schools* (1990) (emphasis added).

[20] Daniel McGroarty, *Break These Chains: The Battle for School Choice* (1996); Mikel Holt, *Not Yet "Free at Last": The Unfinished Business of the Civil Rights Movement—Our Battle for School Choice* (ICS Press 2000).

[21] *E.g.*, James S. Coleman, Sally B. Kilgore, & Thomas Hoffer, *High School Achievement: Public, Catholic, and Private Schools Compared* (1982); Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. Lab. Econ. 98 (1997); Paul T. Hill, Gail E. Foster, & Tamar Gendler, *High Schools With Character* (Rand 1990).

with the odds of graduation for urban black and Hispanic children increasing 26 percent and the likelihood of college attendance increasing threefold.[22] Urban minorities receive significant benefits from Catholic schooling "because their public school alternatives are substantially worse than those of whites and other minorities who live in rural or suburban areas."[23]

In sum, the empirical data leave no doubt that school choice experiments hold promise for great improvement in public and private education in the most disadvantaged communities, and no doubt that religious schools are vital to achieving such results. Indeed, given the demonstrated importance of religious schools in forming the critical mass of private schools necessary to make a school choice program function at all, it is not an overstatement to say that a school choice program that excludes religious schools is likely doomed from the start.

II. The Maine Court's Reading of *Davey* Rests Upon A Misunderstanding Of The Free Exercise Clause That Unjustifiably Threatens To Undermine The Nation's School Choice Experiment.

As long as it acts in conformity with the Constitution, a State is of course free to pursue unwise or wrong-headed educational policies. As shown below, however, the Maine Supreme Judicial Court has not only approved a policy that threatens to undermine the basic efficacy of school choice by foreclosing the option of religious schools and thus limiting the number of private schools that can participate. It has done so based upon an interpretation of the First Amendment that is wholly unfounded.

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[22] Neal, *supra*, at 98-100.

[23] *Ibid.*

A. *Davey* Did Not Disturb The General Rule That Facial Religious Discrimination By The State Is Presumptively Unconstitutional.

Few principles are more firmly settled in this Court's jurisprudence than that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990); see also *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978). Although the Court in *Smith* held that neutral, generally applicable laws are not typically subject to strict scrutiny, both the majority and dissenting Justices in *Smith* agreed that the state's *facial* religious discrimination is presumptively unconstitutional. 494 U.S. at 877; *id.* at 894 (O'Connor, J., concurring in judgment); *id.* at 909 (Blackmun, J., dissenting). As the Court unanimously held in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993), the "minimum requirement of neutrality is that a law not discriminate on its face." Thus, laws that facially discriminate against religion "must undergo the most rigorous of scrutiny": they "must advance interests of the highest order, and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (quotations omitted).

Davey did not alter this fundamental doctrine. To the contrary, the Court there expressly reaffirmed the rule set forth in *Lukumi*. See 540 U.S. at 720-721. As the Court went on to explain, however, the ordinary "presumption of unconstitutionality" did not apply because the government was not in fact discriminating between similarly situated religious and nonreligious individuals. *Id.* at 721-725. As the Court put it: "training for religious professions and training for secular professions *are not fungible*. Training someone to lead a congregation *is an essentially religious endeavor*. Indeed, majoring in devotional theology *is akin to a religious calling*." *Id.* at 721 (emphasis added).

The Court thus reasoned that comparing educational training for the ministry to educational training for secu-

lar professions is not comparing apples to apples. And because "[t]he State ha[d] merely chosen not to fund a *distinct category* of instruction," the Court held that "deal[ing] differently with religious education for the ministry than with education for other callings" was "not evidence of hostility toward religion." *Id.* at 712, 721 (emphasis added). Rather, the fact that the program "exclud[ed] *only* the ministry from receiving state dollars reinforced [the Court's] conclusion that religious instruction [was] *of a different ilk*." *Id.* at 723 (second emphasis added).

This reading of *Davey* is confirmed by an examination of the nature of the program at issue there. Washington's Promise Scholarship program "permit[ted] students to attend pervasively religious schools, so long as they [were] accredited." *Id.* at 724. The program also "includ[ed] religion" by allowing students to study religion in non-theology-major coursework, or to take courses that offered a religious perspective on secular subjects. *Id.* at 724-725. Because the program did not discriminate between similarly situated individuals, the Court rejected the argument that "the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725. And "[w]ithout a presumption of unconstitutionality, Davey's claim [had to] fail." *Ibid.*

In sum, *Davey* does not authorize the government to engage in religious discrimination in education unless the coursework for which funding is being denied amounts to "*an essentially religious endeavor*" or a "*religious calling*." 540 U.S. at 721 (emphasis added). Nor does it authorize discrimination against those who attend "pervasively religious schools, so long as they are accredited" and the student attending them is not seeking "religious education *for the ministry*." *Id.* at 721, 724 (emphasis added). Where a State denies funding to those attending religious schools whose curriculum fully serves the State's secular educational ends, the "presumption of unconstitutionality" (*id.* at 725) remains fully applicable.

B. *Davey* Rests On The Notion That Ministerial And Secular Education Are Not Fungible, And Does Not Support Discrimination Between Religious And Secular Schools That Equally Serve The State's Secular Objectives.

Citing "the benefit of the analysis in [*Davey*]," the court below nevertheless held that it was "unnecessary to apply a strict scrutiny analysis" to Maine's policy of denying tuition only to parents who enroll their children in religious schools. Pet. App. 27. According to the court, "the mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity." *Ibid.* The court acknowledged that such an approach "read [*Davey*] broadly," but found this reading of *Davey* justified by the "play in the joints" between the Establishment and Free Exercise Clauses. *Id.* at 19, 21. This analysis is flawed at many levels.

1. To begin with, facial discrimination against religion is subject to strict scrutiny even if such discrimination is *not* motivated by animosity toward religion. In *Lukumi*, for example, only two Justices (Kennedy and Stevens, JJ.) even found it relevant that the ordinance at issue was motivated by animus. See 508 U.S. at 540-542 (plurality opinion). The Court's majority found that strict scrutiny was warranted solely because the statute, on its face, treated religious reasons for killing animals less favorably than secular reasons for doing so. *Id.* at 533. The same reasoning warrants the application of strict scrutiny here.

2. More fundamentally, however, the court below failed to consider the *reason* that this Court did not apply strict scrutiny in *Davey*: the fact that training for ministry and training for secular professions were not "fungible." 540 U.S. at 721. For a number of reasons, that rationale does not apply to Maine's tuition program.

First, the religious schools to which petitioners send their children do not offer "devotional degrees," "religious training of clergy," or "education for the ministry." *Id.* at

721, 722 n.5, 725. Thus, attending these schools is not "an essentially religious endeavor," as was the education of Joshua Davey. *Id.* at 721. Moreover, nothing in Maine law constitutes a specific, narrowly tailored provision that could conceivably be justified as a longstanding state ban on public funding for the training of clergy.

Second, several features of Maine's tuition law make clear that, in contrast to schools that train students for the ministry, the religious high schools excluded from Maine's tuition program fully satisfy the State's secular objective of preparing students to enter secular careers.

For example, as a condition for designation as an "approved" school for state attendance purposes, Maine requires (among other things) that all schools either receive accreditation from the New England Association of Colleges and Secondary Schools or comply with mandates including basic instruction in designated curriculum, certification of teachers, length of school day, and student-teacher ratios. Pet. App. 4. Schools that choose the latter route to approved status must use the English language for general-instruction, provide special education classes and courses in American and Maine history, including Native American history. 20-A M.R.S. §§ 4701, 4702, 4706.

Moreover, for secondary schools, Maine law provides that "[t]he course of study must include instruction of all students in English language arts, mathematics, science and technology, social studies, health and physical education, career preparation, visual and performing arts and foreign languages. *Id.* § 4721. And to confer diplomas, such schools must offer (and students must complete) four years of English, two years of social studies and history, two years of mathematics, two years of science, and one year of fine arts; instruction in health, safety, and physical education and computers. *Id.* §§ 4722-4724. In addition, private schools that enroll at least 60 percent of publicly funded students are subject to the "statewide system of learning results"—"high academic standards at all grade

levels in the areas of math; English; science and technology; social studies, including history, economics and civics; career preparation; visual and performing arts; health and physical education; and foreign languages." *Id.* § 6209.

The curricular offerings of the religious schools that seek to participate in Maine's tuition program are no less able than secular schools' offerings to satisfy these secular educational objectives. Religious schools that satisfy each and every criterion, however, are categorically excluded from participating. *Id.* § 2951(2). This stands in sharp contrast to *Davey*, where the issue was whether a State could exclude one distinct category of instruction, *not* whether religious schools could be excluded wholesale. Indeed, *Davey* expressly relied upon the State's inclusion of accredited "pervasively religious schools" to explain why Washington's program did not exhibit hostility to religion. 540 U.S. at 721-724; see generally Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 Harv. L. Rev. 989, 1020 (1991) ("parochial schools, provided they meet the same objective standards of educational quality met by the public schools, produce the same benefit to the public, and they cost no more").

3. The fact that Maine law facially discriminates against similarly situated religious schools is further confirmed by 20-A M.R.S. § 2903, "Governing body requirements." That section provides that "[n]othing in this subchapter shall restrict the authority of the governing body of a private school to require additional subjects to be taught in their school." Thus, parents are entitled to reimbursement from the State for tuition at private high schools that offer courses in Marxism—an *atheistic* philosophy—regardless of whether such courses further the State's educational objectives. But a parent may not receive reimbursement for tuition at religious schools—even if the schools satisfy every state curricular mandate—solely because they also offer coursework in religious subjects (or courses that offer a religious perspective on secular subjects).

In *Davey*, this Court went out of its way to make clear that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." 540 U.S. at 722 n.5. But 20-A M.R.S. § 2903 expressly favors private schools that incorporate a secular philosophy into their teaching over functionally similar private schools that incorporate a religious philosophy into their teaching. In other words, Maine's treatment of the non-state-mandated elements of private schools' curricula provides powerful evidence that Maine disfavors schools that, but for religious affiliation, are similarly situated to eligible secular schools. *Davey* provides no support for such facial religious discrimination.

4. One final statutory provision highlights the discriminatory quality of Maine's tuition program. Section 1221, entitled "Teaching of virtue and morality," mandates that "[i]nstructors of youth in public or private institutions shall use their best endeavors to impress on the minds of the children and youth committed to their care and instruction" the following principles:

> *the principles of morality and justice and a sacred regard for truth*; love of country, *humanity and a universal benevolence*; *the great principles of humanity* as illustrated by kindness to birds and animals and *regard for all factors which contribute to the well-being of man*; industry and frugality; chastity, moderation and temperance; and *all other virtues which ornament human society*.

20 M.R.S. § 1221 (emphasis added). The statute further requires all public and private school teachers "to lead those under their care, as their ages and capacities admit, *into a particular understanding of the tendency of such virtues to preserve and perfect a republican constitution, secure the blessings of liberty and to promote their future happiness*." *Ibid.* (emphasis added).

State law thus requires both public *and* private schools to provide morals education. And each and every school

that does so is entitled to state support—unless, of course, the school's understanding of such virtues is grounded in a religious perspective. It is difficult to imagine a clearer case of discrimination against parents who choose to send their children to religious schools.

In sum, the broader framework of the State's education statutes confirms that Maine's refusal to reimburse tuition expenses of parents who send their children to religious schools is subject to a presumption of unconstitutionality. In contrast to training for the ministry, at issue in *Davey*, the curricular offerings of private religious schools in Maine fully meet the State's secular educational objective of "career preparation." 20-A M.R.S. § 4721. Moreover, the State bends over backwards to preserve the integrity of non-state-mandated coursework offered by approved private schools—except in the case of private *religious* schools. This Court's review is therefore warranted to ensure that when the government discriminates between functionally equivalent religious and secular educational offerings, it has a compelling reason for doing so. Maine has offered no such justification.[24]

5. A decision in this case would also have a direct effect on school choice experiments in the more than 30

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[24] Perhaps aware that its reading of *Davey* was overly broad, the court below sought to buttress its holding by reasoning that § 2591(2)'s exclusion of religious schools does not "substantially burden" religion because "[n]one of the parties asserts that their religious beliefs *mandate* that they send their children to religious schools." Pet. App. 9, 27 (emphasis added). But the "substantial burden" analysis is relevant only to whether a *neutral* law burdens religion. Where a law *facially* discriminates against religion, the Court does not consider whether the burden involved is substantial because the discrimination itself is the injury. *E.g.*, *Smith*, 494 U.S. at 877. Were the rule otherwise, the state could justify religious discrimination on the ground that the benefits involved were not substantial. That has never been the law.

States whose constitutions contain "Blaine Amendments." See *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Those provisions, like the Maine law at issue here, facially discriminate on the basis of religion and thus are presumptively invalid. Moreover, those provisions are frequently construed to discriminate against children who pursue religious schooling even in cases involving indirect aid. *E.g.*, *Bush* v. *Holmes*, 886 So. 2d 340, 363-365 (Fla. Dist. Ct. App. 2004) (invalidating a school choice program, over free exercise objections, under a Blaine Amendment), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). Thus, those provisions likewise threaten to stifle the school choice experiment before it has a fair chance to succeed.

* * * * *

School choice is a promising experiment, and religious schools are a critical component of that experiment. Based upon a misinterpretation of *Davey*, however, the court below has created significant uncertainty as to whether restrictions such as those found in Maine law, and in States with Blaine Amendments, are constitutional. This Court should grant the petition and settle once and for all the question whether States may discriminate against parents who choose an educational option that fully satisfies every secular state objective, solely because the education is offered by a religious school.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2006

APPENDIX

INTERESTS OF *AMICI CURIAE*

The Alliance for School Choice (the Alliance) is a nonprofit organization whose mission is to improve our nation's K-12 system of education by advancing systemic and sustainable public policies that empower parents, particularly in low-income families, to choose the education they determine is best for their children. The Alliance and its sister organization, Advocates for School Choice, are leading national advocates for public funded school choice programs that are targeted toward disadvantaged schoolchildren. As a result, the Alliance is deeply and directly concerned with legal obstacles that prevent the fulfillment of our nation's sacred promise of equal educational opportunities for all children.

The Black Alliance for Educational Options (BAEO) is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and businesspeople. BAEO's mission is actively to support parental choice to empower families and increase their educational options. Low-income parents—principally blacks and Hispanics—have less access than middle- and upper-income parents to high-quality schools. This lack of access contributes to the widening gap between minorities and whites on virtually every indicator of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for disadvantaged black children without meaningful choice among educational opportunities.

The Hispanic Council for Reform and Educational Options (CREO) is a non-profit, non-partisan organization that was formed in response to the educational crisis of Latino children, who are officially the most uneducated and under-educated minority group in the nation. CREO's mission is to improve educational outcomes for Hispanic children by empowering families through parental choice in education.

The Milton and Rose D. Friedman Foundation for Educational Choice (the Foundation) was founded upon the ideals and theories of Nobel Laureate economist Milton Friedman and economist Rose D. Friedman. The Foundation strives to educate parents, policymakers, and other organizations about the desperate need for a shift of power to the disenfranchised parents of America who have limited choices in the education of their children.

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Supreme Court of the United States

JULIA ANDERSON, *et al.*,
Petitioners,
v.
TOWN OF DURHAM, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME COURT

BRIEF OF STATE OF FLORIDA GOVERNOR JOHN ELLIS "JEB" BUSH AND THE STATE BOARD OF EDUCATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Florida Governor Jeb Bush and the Florida State Board of Education ("State Board") respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.2(a).[1] Like the State of Maine, the State of Florida has a long tradition of enabling students to attend the private religious or non-religious schools of their choice on public scholarships. However, unlike Maine, Florida has sought to perpetuate this tradition for most of its history because Florida respects the choices of students and their parents, considers discrimination against a class of persons solely because of their religious affiliation unjustifiable, and promotes sound secular objectives such as educational achievement.

Amici curiae have an interest in this Court's consideration of whether the Maine Supreme Court's interpretation of the First Amendment of the United States Constitution is consistent with, among other decisions of this Court, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Locke v. Davey*, 540 U.S. 712 (2004), because several crucial neutral scholarship programs rooted in Florida's educational heritage may be overturned based on a similar construction of the Constitution by the Florida First District Court of Appeal. The Florida appellate court struck a neutral K-12 scholarship program under Florida's Blaine amendment because religious schools participated and held its action consistent with the federal Free Exercise and Equal Protection Clauses. *See Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st Dist. Ct. App. 2004) (*en banc*) *aff'd in part*, 919 So. 2d 392 (Fla. 2006). Florida's Blaine amendment, as interpreted by the Florida appellate court, is

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[1]Petitioners filed a blanket consent to the filing of briefs *amici curiae* and respondents have granted consent by letters filed with this Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation of the brief.

identical in effect to ME. REV. STAT ANN. tit. 20, § 2951(2). *See Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006).

The Early History of Neutrality in Florida

Locke indicates that historical tradition is an important factor in determining whether an exclusionary public scholarship program on the basis of religion falls within the "play in the joints" between the federal religion clauses. *See* 540 U.S. at 722-23. Unlike in *Locke*, neutral educational scholarship funding has deep historical roots in both Maine and Florida. Florida's tradition dates back to the early-1800s, when the educational system was almost exclusively private and sectarian. Indeed, religious schools were virtually the only schools in Florida until the Civil War and, as such, the little public funding that existed for education was shared with them. *See* HARRY GARDNER CUTLER, HISTORY OF FLORIDA: PAST AND PRESENT 222-23 (1923). Even after the ratification of the Constitution of 1868, when Florida began to distinguish more carefully between public and private schools, the line was blurred. Private religious schools received public funding and it was not uncommon for a religious school to be designated as a public school. THOMAS EVERETTE COCHRAN, HISTORY OF PUBLIC-SCHOOL EDUCATION IN FLORIDA 52 (1921); *see also* Sister Mary Alberta, A Study of the Schools Conducted by the Sisters of St. Joseph of the Diocese of St. Augustine, Florida, 1866-1940, at 40 (Aug. 1940) (unpublished M.A. thesis, University of Florida).[2]

Neutral public funding for parochial education continued even after Florida adopted its post-Reconstruction Constitution of 1885, incorporating the State's first Blaine amendment and

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[2]For additional historical information about Florida's public funding of religious education, *see* Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1 (2005).

enacting the separate but equal educational doctrine. Fla. Const. Decl. of Rts., § 6 (1885) ("No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."); Fla. Const. art. XII, § 12 (1885) ("White and colored children shall not be taught in the same school, but impartial provision shall be made for both."). Neutral public funding did not lapse until the 1910s. *See* Alberta, *supra*, at 41-42 (Duval County erected a school building for the Sisters of Saint Joseph to conduct a common school seven years after enactment of the 1885 Constitution, which they did not "surrender" until around 1914); *see also id.* at 42-43 and MICHAEL J. MCNALLY, CATHOLIC PARISH LIFE ON FLORIDA'S WEST COAST, 1860-1968 149 (1996) (Pasco County erected a school building for Saint Anthony's in 1892 and Sacred Heart in 1916).

Demonstrating the linkage of Florida's Blaine amendment with bigotry, Florida began to enforce its Blaine amendment as anti-Catholic nativism peaked in the run up to World War I. *See* MCNALLY, *supra*, at 74 (Bishop Michael J. Curley wrote, "We Catholics . . . are victims of organized vilification and the government itself through the mails takes a hand by the distribution of lewd and lascivious anti-Catholic filth."). The press, legislature, governor and secret societies joined in anti-Catholic, anti-immigrant, and anti-black rhetoric. For example, the legislature adopted *An Act Prohibiting White Persons from Teaching Negroes in Negro Schools* aimed at the Sisters of St. Joseph and a *Convent Inspection Bill*. *Id.* at 74-75 (*Convent Inspection Bill*); Robert B. Rackleff, *Anti-Catholicism and the Florida Legislature 1911-1919*, 50 FLA. HIST. Q. 352, 353

(1972).[3] In one of the most thoroughly prejudicial speeches of the period fanning nativist fears, Governor Sidney J. Catts even warned that German Catholics in Florida were planning an armed-Negro insurrection for German Kaiser Wilhelm II, after which the Pope purportedly would relocate the Vatican to Florida and take political control. *See* MCNALLY, *supra*, at 78-79.

Neutrality After World War II

In the years following World War II, nativism subsided, and the Florida Legislature began approving the precursors to today's publicly-funded school choice programs, beginning with post-secondary education and expanding to pre-K through grade 12 education. In the 1950s, the Legislature approved public scholarships or loans for students to study teaching or nursing at any eligible Florida institution, including religious ones. Ch. 29726 § 2, 1955 Fla. Laws 231, 232-33 (teaching); Ch. 29819 § 2, 1955 Fla. Laws 572, 573-74 (nursing). The Legislature expanded these professional scholarship programs in succeeding years. *See, e.g.*, Fla. Stat. §§ 1009.54, 1009.57-.62, 1009.66, 1009.67 (2005).

In 1961, the Legislature enacted the precursor to the current-day Corporate Income Tax Credit ("CITC") Scholarship Program. The 1961 Program was designed to assist economically disadvantaged Florida high school graduates with college tuition. 1961 Fla. Laws 1091, 1092. It drew no distinction between religious and non-religious colleges. Today, the CITC Program enables K-12 students to attend the private religious or secular school of their parents' choice. Fla. Stat. § 1002.20(6) (2005). It provides income tax credits to corporations for contributing to scholarship funding

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[3]Both the adoption of the Blaine amendment and the nativism of the 1910s coincided with Catholic immigrant influxes into the State. *See* Adams, *supra* at 21-23, 29-34.

organizations, which, in turn, offer scholarships to economically disadvantaged students. *See* Fla. Stat. § 220.187 (2005).

In 1963, the Florida Legislature established the first need-based loan assistance program, benefitting eligible residents attending the public or private religious or non-religious colleges of their choice. 1963 Fla. Laws 1176, 1178, *codified at* Fla. Stat. § 239.67(4) (1967). Florida post-secondary educational loan assistance has since grown and diversified. *See, e.g.*, Fla. Stat. §§ 1009.50, 1009.52, 1009.89(3), 1009.891(3), 1009.73, 1009.72 (2005).

In 1965, the Legislature approved Florida Regents Scholarships, the precursor to today's Florida Bright Futures Scholarship Program ("Bright Futures"). The Florida Regents Scholarship Program provided state funds to eligible high school graduates to assist them in paying tuition costs at the accredited religious or non-religious college of their choice. 1965 Fla. Laws 1683, 1684, *codified at* Fla. Stat. § 239.451 (1967). Bright Futures, created in 1997, is a publicly-funded merit scholarship program that allows recipients to apply their scholarship money toward tuition at an eligible religious or non-religious college to pursue the degree of the recipient's choosing. Fla. Stat. §§ 1009.53, 1009.533 (2005).

Florida again demonstrated its commitment to religious neutrality in 1968, when the Legislature created a K-12 voucher program, enabling disabled students to attend private religious or non-religious schools. 1968 Fla. Laws 240, 243; *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978). This program was replaced by the McKay Scholarship Program ("McKay"). Fla. Stat. § 1002.39. McKay provides for payment by individual warrant made payable to eligible students' parents. *See* Fla. Stat. § 1002.39(6)(f) (2005).

The Florida Legislature enacted the Opportunity Scholarship Program in 1999, benefitting children attending K-12 public schools that received a failing grade for two out of four years. Fla. Stat. § 1002.38(2)(a)1. The OSP allowed parents to send their children to another public school or, like McKay, to receive a warrant for tuition at a private religious or non-religious school. Fla. Stat. § 1002.38(1) (2005). Participating schools had to agree, among other things, to "accept scholarship students on an entirely random and religious neutral basis" and not to "compel any student attending . . . on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship." Fla. Stat. §§ 1002.38(3)(b), (4)(e), (j) (2005).

Under the OSP, eligible students enrolled in roughly equal numbers in eligible non-religious (45%) and religious (55%) schools. *See* OSP June Quarterly Report (2006) *available at* https://www.floridaschoolchoice.org/Information/OSP/quarterly_reports/osp_report_jun2006.pdf. Economically disadvantaged racial minorities were the primary beneficiaries. Roughly 93.9% of enrollees in the OSP were Hispanic-American or African-American, and 72% of enrollees qualified for free or reduced-price lunches. *Id.*

The OSP improved educational achievement among Florida's most needy populations. Hispanic-Americans and African-Americans experienced the most dramatic gains in educational achievement in Florida since 2001. For example, among third graders, 68% of Hispanic-Americans and 54% of African-Americans are reading at or above grade level in 2006, compared with 44% of Hispanic-Americans and 29% of African-Americans in 2001. *See* Reading and Mathematics, Grades 3 & 12 (May 1, 2006) *available at* http://fcat.fldoe.org/pdf/06gr3gr12mediapacket.pdf. In mathematics, among third graders, 68% of Hispanic-Americans and 54% of African-Americans are on grade level in 2006, compared with 44% of Hispanic-Americans and 29% of African-Americans in 2001. *Id.*

Most recently, the legislature enacted Florida's Voluntary Pre-kindergarten Program, Fla. Stat. §§ 1002.53, 1002.55, 1002.61 2005, a school choice program providing free pre-kindergarten education to any four-year old child in Florida. As in both Maine's voucher program and Florida's McKay Program and the recently stricken Opportunity Scholarship Program ("OSP") (as discussed *infra*), parents are responsible for selecting a school, whether religious or non-religious, for their children and then restrictively endorsing the warrant to the chosen school. *See* Fla. Stat. § 1002.39(6)(f) (2005).

Recent Threats to Neutrality in Florida

Florida's First District Court of Appeal, relying upon *Locke v. Davey*, 540 U.S. 712 (2004), struck down under Florida's Blaine amendment the participation of private schools in the OSP (the "private OSP option"), notwithstanding the Program's educational success. *See Bush v. Holmes,* 886 So. 2d 340, 360 (Fla. 1st DCA 2004) (citing Fla. Const. art. I, § 3 (1968)) (*en banc*), *aff'd in part*, 919 So. 2d 392 (Fla. 2006). That court held that the Free Exercise Clause of the First Amendment to the United States Constitution does not require Florida to afford religious entities equal participation in programs of general applicability that are both neutral towards religion and that have a secular purpose. *Id.* The Florida Supreme Court affirmed the ruling on other grounds. *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006).

Because the First District Court of Appeal's decision was premised upon reasoning quite similar to the Maine Supreme Court's in the instant case, Florida's remaining scholarship programs outlined above are vulnerable unless this Court corrects the misinterpretation of *Locke* by the Maine Supreme Court and Florida's First District Court of Appeal. Because of the risk to these neutral educational scholarship programs, *amici curiae* urge this Court to grant the petition for writ of certiorari to settle

the important federal questions that petitioners have raised in the interest of student and parental choice, religious neutrality, and educational achievement in all states. *Amici curiae* would rephrase the second question presented as follows:

> Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious persons entirely from an otherwise neutral, generally available, public educational scholarship program with a secular purpose?

SUMMARY OF ARGUMENT

Maine's voucher program discriminates on its face against persons solely because they are religious. This Court in *Locke* upheld the Washington Promise Scholarship Program because, although students could not receive scholarships to pursue a clerical degree, they could pursue every other degree program at devoutly religious schools even while taking classes in devotional theology. The Maine Supreme Court misinterpreted *Locke* to hold that Maine could prohibit altogether that which this Court said rendered the Promise Scholarship Program constitutional – the Program went "a long way toward including religion in its benefits." 540 U.S. at 724. The court also applied the wrong standard of constitutional review.

Maine's withholding of tuition vouchers from parents who want to send their children to religious schools, contrary to the state's historic practice, demonstrates hostility to religion to the objective observer, rendering it unconstitutional under the First and Fourteenth Amendments. This disparate treatment alone, without civil or criminal sanctions, a "violation of their religion," or anything more, violates the Free Exercise and Equal Protection Clauses. Maine's discriminatory statute is identical in effect to Florida's Blaine amendment, as interpreted by Florida's appellate court. Maine's alleged interest in seeking to avoid excessive entanglement with religion can be achieved through means far less restrictive and, thus, more narrowly tailored than excluding otherwise eligible religious persons from a K-12 scholarship program.

ARGUMENT

Florida's First District Court of Appeal extended *Locke* far beyond the limited application intended. *See Bush,* 886 So. 2d at 360. Now, the Supreme Court of Maine has done the same in upholding a statute that is facially discriminatory towards religious persons merely because they are religious. *See Anderson,* 895 A.2d at 961. ME. REV. STAT ANN. tit. 20, § 2951(2), states, "A private school may be approved for the receipt of public funds for tuition only if it . . . (2) . . . is nonsectarian in nature in accordance with the First Amendment of the United States Constitution." *See Anderson*, 895 A.2d at 949. The statute guides the implementation of Title 20-A, which authorizes the State's Department of Education and school districts to build their own high schools, to contract with other school district or eligible private schools, or, when there is no high school in a district, to use public funds to pay the tuition costs at an eligible private school of the parents' choice. *See id.* at 948.

Prior to 1980, Maine, like Florida, had a long history of allowing public funds to be used for tuition payments at approved sectarian schools. *See id.* Maine abandoned this tradition in 1980, when the legislature adopted ME. REV. STAT. ANN. tit. 20, § 2951(2), in response to the attorney general's opinion that the practice violated the Establishment Clause. *See id.* Upholding the statute despite its improper rationale, *see Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), the Supreme Court of Maine reasoned, like the Florida First District Court of Appeal, that *Locke* permitted the legislature to exclude religious persons from the state K-12 voucher program without triggering a federal free exercise, establishment or equal protection violation. *See Anderson,* 895 A.2d at 961. Both state courts have misinterpreted the requirements of the First and Fourteenth Amendments of the United States Constitution.

I. AS INTERPRETED BY MAINE'S SUPREME COURT, ME. REV. STAT. ANN. TIT. 20, § 2951(2) VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A law that is not neutral and withholds a generally available, public benefit from an individual on the basis of religion is subject to strict scrutiny under the Free Exercise Clause of the United States Constitution. *See Lukumi*, 508 U.S. at 546; *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (holding that New Jersey could not withhold the benefits of general welfare legislation on the basis of an individual's faith or lack thereof); *see also Locke*, 540 U.S. at 726-27 (Scalia and Thomas, JJ., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured[.]"); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (strict scrutiny applied to facially discriminatory law allowing funding for paraprofessionals to assist disabled children in the classroom so long as those children did not attend religious schools); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (strict scrutiny applied to Army regulation governing the provision of child care on base barring providers from engaging in religious practices).

The minimum standard, when assessing a statute's neutrality, is that it not be facially discriminatory. *Lukumi*, 508 U.S. at 533. *See also Locke*, 540 U.S. at 726 (Scalia and Thomas, JJ., dissenting) (referring to facial neutrality as a "'necessary condition for free exercise constitutionality'") (citing *Lukumi*, 508 U.S. at 563). The exception to this rule fashioned by Maine's Supreme Court in an effort to apply rational basis review to the exclusion of eligible religious persons from a K-12 scholarship program, *see Anderson*, 895 A. 2d at 959, is unsupported by *Locke* and other precedent. It may be true that the Establishment Clause itself discriminates against religion "by singling it out as the one thing the States cannot establish," but

this simply means that the States have "a compelling interest in not committing *actual* Establishment Clause violations." *See Locke*, 540 U.S. at 730 n.2 (Scalia and Thomas, JJ., dissenting) (emphasis in original). *Anderson* perpetuates a "shameful pedigree" of hostility toward religion which this Court should not hesitate to review and disavow. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

A. The Maine Supreme Court Has Misread *Locke* and Thereby Permitted Unlawful Discrimination Against Religious Persons.

Locke supports not the exclusion of religious persons from Maine's scholarship program, but their inclusion. This Court in *Locke* upheld a Washington scholarship program wholly different from the one before the Maine Supreme Court. Washington scholarship recipients were permitted to use an award to pursue a broad variety of college degrees at "pervasively religious schools" while taking "devotional theology courses." *Locke*, 540 U.S. at 724-25. They were barred from using scholarship funds to pursue only an essentially religious endeavor; *i.e.*, a "degree in theology." *Id.* at 716. In contrast to Maine and Florida's tradition of neutral public funding for K-12 education, this Court affirmed the exclusion of *only* the ministry from receiving state dollars on the basis of a deeply-rooted American tradition manifest in early taxpayer protests, *id.* at 722, and state constitutions. *Id.* at 723. This reinforced the Court's "conclusion that religious instruction is of a different ilk." *Id.*

Besides clerical college degrees, "there are few areas in which a state's antiestablishment interests" justify the type of exclusion practiced by Maine. *Id.* at 722. Education of K-12 schoolchildren does not qualify. As the dissent below pointed out, "[P]rimary and secondary education . . . is compulsory for all

students in Maine, and in no way constitutes the 'training for religious professions' that uniquely limited the Supreme Court's holding in *Locke*." *Anderson*, 895 A.2d at 964 (Clifford, J., dissenting). In fact, the very reasons this Court gave in *Locke* for why the Promise Scholarship Program was constitutional – that it permitted the expenditure of scholarships on all but clerical training in religious and non-religious schools – are precisely those requiring § 2951(2) to be overturned under the Free Exercise Clause. 540 U.S. at 724.

Whereas the use of public funds to support church leaders has long been considered one of the "hallmarks of 'established' religion," *see id.* at 722, the question of establishment is not even debatable in the case of Maine's school choice program. *See Zelman*, 536 U.S. at 655 (holding that an Ohio school choice program that allowed state tuition vouchers to be used at private religious schools did not violate the Establishment Clause). Yet avoiding an establishment was the only compelling governmental interest that Maine identified as justifying the enactment of § 2951(2), and which the statute itself referenced. As the dissent below notes, the statute should, therefore, have been stricken under the court's prior holding that "[i]f the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny." *Anderson*, 895 A.2d at 963 (Clifford, J., dissenting) (citing *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 137-38 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999)).

> The compelling governmental interest that justified the enactment of section 2951(2) . . . is no longer operative, and, accordingly, there is no longer any kind of compelling State interest that justifies the unequal treatment mandated by section 2951(2). Section 2951(2) can no longer withstand strict scrutiny analysis. Further, even if *Locke* is read more broadly than its language

> would seem to allow, and a rational relationship test is applied to the equal protection interests of the parents, there is no legitimate rationale that should be considered by the Court to justify the discrimination manifested in section 2951(2).

See id. at 965; *Hartmann*, 68 F.3d at 979 ("A program that violates the Free Exercise Clause cannot be saved by relying on implausible Establishment Clause concerns.").

This Court in *Locke* reaffirmed that there can be "play in the joints" between the federal religion clauses when there is (1) a long-standing practice dating to the founding of the republic excluding public funding for religious training, and (2) a "close call" as to whether complying with one of the federal religion clauses could violate the other. *See* 540 U.S. at 728 (Scalia and Thomas, JJ., dissenting). It can hardly be said that either Maine or Florida has any historic practice of excluding religious persons from educational scholarship programs or that Maine's pre-1980 practice of using public money to fund tuition vouchers at religious and non-religious schools was a "close call" on the Establishment Clause issue. *See Zelman*, 536 U.S. at 662-63. Maine and Florida's historic practice is more like the "benevolent neutrality" called for in *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970), where the "play in the joints" principle finds its roots in upholding another firmly-rooted historical practice, exempting church property from taxation. *Id.* at 673, 677. *Accord Holmes*, 886 So. 2d at 388 (Polston, J., dissenting) ("State action may be permitted within the space of 'play in the joints' when it is 'productive of a benevolent neutrality' according to *Walz*.")

Maine's Supreme Court hypothesized, even in the wake of *Zelman*, that it "remains conceivable" for indirect funding of scholarship programs in which religious schools participate to violate the Establishment Clause. *See Anderson*, 895 A.2d at

960. As petitioners argue, this threat is valid only in direct aid, not indirect aid cases such as this one. *See* Petition, at 17-19. But even if this were not true, the mere potential for a violation of the Establishment Clause is neither a compelling nor rational basis to justify the discrimination manifest in § 2951(2). Maine's Supreme Court concedes even in this case that a state is "permitted to pass a statute authorizing some form of tuition payments to religious schools[.]" *Anderson*, 895 A.2d at 961. If § 2951(2) were stricken, Maine's voucher system would not be unconstitutional, but simply begin functioning as it had prior to 1980. *See id.* at 948 (citing Op. Me. Att'y Gen 80-2). *Anderson* discusses no instance from 1879 to 1980, when the scholarship program led to an *actual* violation of the Establishment Clause. *Cf. id* at 962 (Clifford, J., dissenting) ("The system worked very well[.]"). Accordingly, the Maine Supreme Court has misinterpreted *Locke* and permitted unlawful discrimination against religious persons.

B. The Objective Observer Would Conclude that ME. REV. STAT. ANN. tit. 20, § 2951(2) Manifests Hostility Toward Religion.

Maine's exclusion of eligible religious persons from a tuition scholarship program broadcasts an unmistakable signal to the objective observer, contrary to the First Amendment, that religious persons are second-class citizens and religious schools are not the equal of others in the pursuit of an educated citizenry. According to Justice O'Connor, the objective observer is similar to the "reasonable person" in tort law, who "'is not to be identified with any ordinary individual,'" but is "'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, Souter and Breyer, JJ., concurring in part and concurring in judgment) (citing W. KEETON, KEETON ON LAW OF

TORTS 175, 5th ed. 1984). This hypothetical observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *See McCreary County, Ky. v. ACLU*, __ U.S. __, 125 S. Ct. 2722, 2737 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (objective observer is familiar with "'implementation of'" government action) (quoting *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring in judgment); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (inquiry looks to "the historical context of the statute . . . and the specific sequence of events leading to [its] passage"); *Pinette*, 515 U.S. at 780 ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community . . . in which the religious display appears.")); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (warning against government sending a message of hostility toward the religious viewpoint). Consequently, the objective observer would know of Maine's historic neutral public scholarship practice.

The objective observer would also be acquainted with "the text, legislative history, and implementation" of § 2951(2), *see Santa Fe*, 530 U.S. at 308 (citation omitted); Maine Const. art. VIII, pt. 1 § 1 (authorizing state grants for the founding of private schools including religious ones); this Court's precedent, including the invalidation by *Zelman* of the singular rationale for Maine's exclusion, *see McCreary*, 125 S. Ct. at 2737; *Pinette*, 515 U.S. at 782; and realize the type and scope of students affected by *Anderson* is much different than in *Locke*. In the latter, only students pursuing post-secondary training for a ministerial career were treated differently, *see Locke*, 540 U.S. at 722, whereas § 2951(2) treats differently all students pursuing a compulsory K-12 education at religious schools. *See Anderson*, 895 A.2d at 948. The sheer number of students precluded from receiving an education at the school of their choice, the amount of the scholarship over a number of years, and the number of

schools and curricular areas affected in Maine is greater than in *Locke*. *Accord* Petition, at 29. Whereas this Court has considered "training for religious professions and training for secular professions . . . not fungible," the same cannot be said of a religious or secular K-12 education when it comes to preparing children for post-secondary education or careers. *Locke*, 540 U.S. at 721. The education has an essentially secular purpose, as opposed to clerical training. Consequently, the objective observer would conclude that § 2951(2) violates the Establishment Clause.

ME. REV. STAT ANN. tit. 20, § 2951(2) is more discriminatory than even the city ordinances at issue in *Lukumi* at 546, where the City of Hialeah had enacted laws in effect banning the ritualistic sacrifice of animals and targeting the Santeria. *See id.* at 527-28. This Court found that the ordinances in *Lukumi*, as in this case, had twin defects: (1) they were not facially neutral and (2) they lacked general applicability, *see id* at 542, 545-46; however, this Court had to go beyond the text of the ordinances to examine their object in *Lukumi*. *Cf. id.* at 557-58 (Scalia and Rehnquist, JJ., concurring in part and concurring in judgment) (distinguishing the defect of lack of neutrality as applying "primarily to those laws that by their terms impose disabilities on the basis of religion" from the defect of lack of general applicability which applies "primarily to those laws which, though neutral in their terms . . . target the practices of a particular religion for discriminatory treatment[.]"). In this case, no searching inquiry into the purposes behind § 2951(2) is necessary. Its text lacks even the pretense of neutrality as it explicitly disqualifies religious schools from participating in the tuition program. This Court could stop there and overrule the Maine Supreme Court, but looking further for the indicia of religious animus discussed in *Lukumi*, 508 U.S. at 534-35, 540, would only support the ruling that § 2951(2) is nonneutral. For example, Maine had a tradition of neutral public funding for education interrupted by the statute; "[t]he specific series of

events leading to the enactment or official policy in question" were premised exclusively upon federal Establishment Clause concerns; and the legislative and administrative history of § 2951(2) reveal that Maine substituted *post hoc* rationalizations when the original rationale was vacated. *Id.* at 540. These objective indicia bear on the statute's nonneutrality and discriminatory object. *Id.*

"[N]o law that is nonneutral . . . can be thought to be of general applicability." *Id.* at 558 (Scalia and Rehnquist, JJ., concurring in part and concurring in judgment). In addition, as in *Lukumi*, § 2951(2) is substantially overinclusive and underinclusive. *See id.* at 538-40, 543-46. Section 2951(2) is underinclusive because the statute is inadequate to "maintain[] diversity within the public schools[] and avoid[] involvement in discrimination in admissions and hiring[.]" *See Anderson*, 895 A.2d at 960. Petitioners and the dissent are correct that the court should never have considered *post hoc* justifications for Maine's exclusion. *See* Petition at 13-16, *see also id.* at 965 (Clifford, J., dissenting). In addition, the Court's consideration was incomplete. Section 2951(2) "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree[.]" *Lukumi*, 508 U.S. at 543. Thus, the conclusion is inexorable that § 2951(2) is unconstitutional because it pursues "governmental interests only against conduct motivated by religious belief." *Id.* at 545.

In addition, § 2951(2) is unconstitutional because it is overinclusive insofar as it precludes students from using scholarships at religious schools complying with the state's academic standards, curriculum, record-keeping requirements, and anti-discrimination laws. *Cf. Anderson*, 895 A.2d at 961. To the extent these are legitimate government interests proper for the court to consider, "they could be addressed by restrictions stopping far short of a flat prohibition[.]" *Locke*, 508 U.S. at 538. Rather than excluding religious persons from public programs in

the interest of avoiding excessive entanglement, Maine could have adopted, for example, generally applicable rules and performance criteria for eligible private schools. *See, e.g.*, Chapter 2006 Fla. Laws ch. 75 (2006). Because § 2951(2) is not narrowly tailored to achieve Maine's only stated interest, it amounts to a poorly shrouded "'religious gerrymander'. . . an impermissible attempt to target petitioners and their religious practices." *Lukumi*, 508 U.S. at 535. *Accord Peter*, 155 F.3d at 997 (ban on funding for paraprofessionals to assist disabled children attending religious schools was not narrowly tailored and unconstitutional); *Hartmann*, 68 F.3d at 979 (ban on child care providers engaging in religious exercise was not the "least restrictive means necessary to prevent an unconstitutional entanglement with religion"). The objective observer would see through it and conclude that § 2951(2) manifests hostility toward religion.

C. Prohibiting Eligible Persons from Receiving Public Scholarships to Attend Religious Schools Violates the Free Exercise and Equal Protection Clauses.

Maine's withholding of tuition vouchers from parents who want to send their children to religious schools violates the constitution. The disparate treatment alone, without criminal or civil sanctions, "violations of religion," or anything more, violates the Free Exercise and Equal Protection Clauses. Even if there was no anti-religious animus underlying Maine's statute, "'[it does not] matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens.'" *Locke*, 540 U.S. at 732 (Scalia and Thomas, JJ., dissenting) (citing *Lukumi*, 508 U.S. at 559). Discrimination against persons on the basis of religion is no more defensible than on the basis of race, nationality, or gender. In Florida, racial and religious discrimination even have a common constitutional heritage in the Constitution of 1885. *See* Fla.

Const. art. XII, § 12 (1885) (separate but equal doctrine) and Fla. Const. art. VI, § 6 (1885) (Blaine amendment).

1. The Imposition of Criminal Sanctions Is Wholly Unnecessary to Find a Free Exercise or Equal Protection Clause Violation.

That § 2951(2) does not impose a civil or criminal penalty on the citizens of Maine is wholly unnecessary to find a Free Exercise or Equal Protection Clause violation. It suffices to trigger strict scrutiny that the statute is not neutral and facially precludes religious schools from participating in a generally available educational program solely because of their religious affiliation. *See Sherbert*, 374 U.S. at 404 ("[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (facially neutral laws that burden religion are constitutional, but not their opposite); *see also Locke*, 540 U.S. at 731 (Scalia and Thomas, JJ., dissenting) ("The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial."); *Hartmann*, 68 F.3d at 979 n.4 (a categorical ban on child care providers engaging in religious exercise was unconstitutional without proof of a substantial burden on religious exercise). Nevertheless, misinterpreting *Locke*, the Supreme Court of Maine held that, because § 2951(2) did not impose sanctions, force students to choose between getting a public benefit and adhering to their religion, or prevent parents from sending their children to religious schools, any manifest religious hostility in law was negligible and, in effect, not constitutionally cognizable. *See Anderson*, 895 A.2d at 956, 959 (explaining that § 2951(2) imposes no impermissible burden on religion).

Whatever the relevance of assessing the degree of religious disfavor inherent in excluding ministerial majors from a neutral scholarship program, conditioning a constitutional violation in this case on the imposition of penalties beyond disparate treatment is inappropriate. In no other context besides scholarships for educating ministers has this Court required criminal penalties as a litmus test for prohibiting the exclusion of persons from an otherwise generally available educational benefit. *See Locke*, 540 U.S. at 732 (Scalia and Thomas, JJ., dissenting). For example, it was enough that African-American students and females were unjustly excluded from public schools without a compelling (racial discrimination) or important (gender discrimination) governmental interest. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning segregation of public school children based on race and the doctrine of "separate but equal"); *United States v. Virginia*, 518 U.S. 515 (1996) (overturning exclusion of women from public military academy). In addition, although this Court has found that civil or criminal penalties imposed upon religious practice *may* lead to a constitutional violation, this Court has not deemed the penalties either sufficient, *see, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (Amish forced to pay tax penalties nowithstanding religious claim), or necessary. *See Sherbert*, 374 U.S. at 403-04 ("[I]t is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry.").

Yet, even if the degree of discrimination were somehow relevant to the outcome of this case, the effect of § 2951(2) is far more discriminatory than Washington's Promise Scholarship Program, *see Locke*, 540 U.S. at 722, and, indeed, than the statute at stake in *Lukumi*. *See infra* at 17. Once more, the state's counterbalanced interest in preventing excessive entanglement is weaker than Washington's interest in not funding clerical education consistent with historic practice. Rather than the "mild" discrimination evident in *Locke*, § 2951(2) imposes a

special disability based only on religion on a whole class of persons who have no choice but to enroll their children in K-12 education. Davey had the choice to pursue post-secondary education and a devotional theology degree. If he did not, Washington could not enforce truancy laws against him, but Maine would against the children involved in this case. Maine's Supreme Court hypothesized that parents acting on their religious beliefs who desired to school their children in their faith tradition could still do so, albeit at an increased cost to themselves. *See Anderson*, 895 A.2d at 956 (citing *Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 354-55 (1st Cir. 2004)). But we know that many would altogether lack the means. For them, Maine's exclusion is total without exception from state truancy laws. The rest may be forgiven for viewing as a "civil penalty" the annual school tuition payments only they must render.

2. A Statute Violates the Free Exercise Clause Through Hostility Towards Religious Practice, Regardless of Whether the Statute Compels Members of Any Religion to Violate the Core Tenets of Their Faith.

The Supreme Court of Maine pointed out that none of the parties to *Anderson* asserted that they were bound by their religious beliefs to send their children to religious schools or to prevent their children from attending secular schools, and refused to extend free expression to an activity that was not fundamentally religious. *See Anderson*, 895 A.2d at 959. Although petitioners' religious beliefs did not *mandate* sending their children to sectarian schools or *proscribe* sending their children to secular schools, their desire to send their children to religious schools was certainly an expression of sincerely-held religious convictions. *See id.* at 950 (petitioners sent their children to religious school "because the school promotes their

sincerely held beliefs as Catholics"); *see also Locke*, 540 U.S. at 722 (citing the petitioner's statement that his "religious beliefs were the only reason for [him] to seek a college degree"); *Proverbs 22:6* (King James) ("Train up a child in the way he should go: and when he is old, he will not depart from it."). It was not a mere preference or choice as between one public school and another. Ordinarily, this Court has required far less than petitioners' kind of religious conviction to find a constitutional violation when persons were granted unequal access to educational benefits. *See Virginia*, 518 U.S. at 523 (female applicants "want[ed] to attend" a publicly-funded military academy).

Requiring adherents to establish "violations of their religion" as a condition of stating a constitutional claim for unequal treatment invariably disadvantages religions, contrary to the Establishment Clause, such as many forms of Christianity which provide for the freedom of believers subject to their consciences. *See Sherbert*, 374 U.S. at 404 ("'[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'") (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)). It is also directly contrary to this Court's warning in *Smith*, that government's ability to carry out public policy "'cannot depend on measuring the effects of governmental action on a religious objector's spiritual development.'" 494 U.S. at 885 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Repeatedly, this Court has said that it is not within the judicial ken to "determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 887.

The First Amendment "guarantees *free* exercise of religion, and when the State exacts a financial penalty . . . for religious exercise – whether by tax or by forfeiture of an

otherwise available benefit – religious practice is anything *but* free." *See Locke*, 540 U.S. at 731 (Scalia and Thomas, JJ., dissenting) (emphasis original). Protected religious exercise is not merely the expression of required orthodoxy, as intimated by the Maine Supreme Court, but also of parents' sincere belief that schooling children in their faith tradition is important. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).[4] To be sure, this is not a case as in *Pierce*, where a state denied pupils access altogether to religious schools, but neither is this a case, as the Supreme Court of Maine characterizes it, merely about petitioners' paying more to exercise a privilege. Consistent with *Lukumi*, *Smith*, and the raft of this Court's precedent overturning racial and gender discrimination and viewpoint discrimination in public forums, petitioners seek no special treatment – just access to a generally available public tuition program. Specially disadvantaging them, without more, violates the Free Exercise and Equal Protection Clauses. *See Smith*, 494 U.S. at 877 ("The government may not . . . impose special disabilities on the basis of religious views or religious status[.]") (citing, *inter alia*, *McDaniel v. Paty*, 435 U.S. 618 (1978)); *Sherbert*, 374 U.S. at 404; *accord Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003).

The Supreme Court of Maine's assertion that no fundamental religious right is violated when the state refuses to fund tuition at religious schools, *see Anderson*, 895 A.2d at 959, also undermines Maine's contention that the prohibition is necessary to prevent excessive entanglement. If the parents are not expressing their religious beliefs when they send their children to religious schools, then Maine's assertion about preventing excessive entanglement is disingenuous. If the

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[4]Demand for the state to fund a private religious education when students are not otherwise eligible would be an entirely different case. *See Children A&B v. Florida*, 355 F. Supp. 2d 1298 (N.D. Fla. 2004), *aff'd*, 140 Fed. Appx 845 (11th Cir. 2005).

parents are expressing their religious convictions when they choose to send their children to a religious school, then Maine is inhibiting their free expression of religion. Maine cannot have it both ways. The Maine Court's reasoning serves not to support its result, but only to underscore the pretextual nature of Maine's rationale for § 2951(2).

3. Maine's Discriminatory Statute Is Identical in Effect to Florida's Blaine Amendment.

In *Anderson*, the Maine Supreme Court noted that the Maine Constitution does not include a Blaine amendment. 895 A.2d at 956 n.13. Ironically, the legislature in James G. Blaine's home state rejected the amendment because of the number of religious schools receiving state funding. *See* Petition, at 26. Following *Zelman*, the court might, therefore, have inferred from this that the state lacked even a hypothetical compelling or rational interest in enforcing § 2951(2). *See* Maine Const. art. VIII, pt. 1 §1; *see also Holmes*, 886 So. 2d at 559-60 (suggesting a state may require greater separation than the Establishment Clause). *But see Widmar v. Vincent*, 454 U.S. 263, 277 (1981) ("[T]he state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause[.]"). Instead, the Maine Supreme Court took this as a positive sign and went on to approve the exclusion of religious schools from a public tuition scholarship program.

A special disability imposed solely on the basis of religious status as a result of a state Blaine amendment such as Florida's would be an additional reason to overrule a decision such as *Holmes*. *See* Art. I § 3 (1968) ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian

institution."). Blaine amendments "have their roots in conflicts between supporters of public schools and supporters of religious, often Catholic, schools in the late nineteenth century." *Anderson*, 895 A.2d at 956 n.13. Florida's Blaine amendment, including its enactment in 1885 and enforcement in the 1910s, is inextricably tied to racial and religious bigotry. *See supra*, at 3-4. A majority of this Court has expressed deep reservations about the constitutionality of a state Blaine amendment. In *Mitchell*, 530 U.S. at 829, the plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" is premised upon a "doctrine, born of bigotry, [that] should be buried now." Joining this plurality, the dissent in *Zelman* recognized that Blaine amendments were intended to disadvantage Catholics and other religious groups. 536 U.S. 720-21 (2002) (Breyer, J., dissenting). *See also Lemon v. Kurtzman*, 403 U.S. 602, 645-46 (1971) (Brennan, J., concurring). In *Locke*, this Court took pains to emphasize it was not reviewing such an amendment. 540 U.S. at 723-24 n.7.

Notwithstanding this precedent and the prejudicial pedigree of Florida's Blaine amendment, the First District Court of Appeal, when it struck down the private OSP option, disagreed with this Court as to whether Blaine-era amendments generally and Florida's in particular are based on bigotry. *See Holmes*, 886 So. 2d at 351 n.9 ("[H]ere, there is no evidence of religious bigotry, relating to Florida's no-aid provision."); *but see id.* at 349 (stating that the intent of the Blaine amendment was to preclude public funding for religious schools). The Florida court failed even to wrestle with this Court's presumption against the constitutionality of a Blaine amendment; therefore, the reasoning of *Holmes* and *Anderson* is similar. *See Holmes,* 886 So. 2d at 360 (*Locke* recognized that "a state . . . can preclude state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause."); *see also id.* at 363 (relying upon *Eulitt v. Maine*, 386 F. 3d 344 (1st Cir. 2004).

The result of the decisions is also identical: tuition vouchers were withheld from parents who want to send their children to religious schools to receive a K-12 education. In addition, both decisions were premised upon an erroneous interpretation of the First Amendment. The Maine Supreme Court upheld an *exclusionary* statute on this basis, whereas the Florida court struck down an *inclusionary* one. The consequences of *these* decisions are more far-reaching than in *Locke*, although the impact of *Holmes* is likely to be even broader than *Anderson*, as many more neutral educational scholarship programs outlined above (*see infra* at 4-7), in addition to non-educational programs, are implicated. *See Holmes*, 886 So. 2d at 376-78, 388-89 (Polston, J., dissenting). These consequences of Florida's Blaine amendment, as interpreted by *Holmes*, and § 2951(2) demonstrate hostility to religion to the objective observer, contrary to the concerted action of the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause "to prohibit state action that restricts, limits, or divests one's legal rights, duties or benefits based on his or her religion." *Id.* at 390 (Polston, J., dissenting). Therefore, this Court should review and overturn *Anderson*.

CONCLUSION

ME. REV. STAT ANN. tit. 20, § 2951(2) violates the First and Fourteenth Amendments to the United States Constitution. State courts have misinterpreted *Locke* and *Lukumi* to permit the exclusion of religious persons solely on the basis of their religious affiliation from K-12 public scholarship programs. Consequently, this Court should grant the petition for certiorari to clarify whether the practice violates the federal constitution.

Respectfully submitted,

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In the Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,
Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,
Respondents.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF TEXAS AND ALABAMA AS AMICI CURIAE ON BEHALF OF PETITIONERS

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QUESTIONS PRESENTED

1. *Weinberger v. Wiesenfelder*, 420 U.S. 636 (1975), teaches that when the government's true reason for treating citizens unequally is known, courts should not accept post hoc justifications that were not the goal of the challenged legislation. In light of *Weinberger*, may the state of Maine justify the unequal treatment of religion in a high school education program on grounds that plainly were not an actual goal of legislators who enacted the program?[1]

2. Until 1980, Maine had a long history of including religious options in its high school "tuitioning" program and there is nothing in the state constitution that even arguably requires the exclusion of religious options from that program. Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious options entirely from an otherwise neutral educational aid program based solely on a misinterpretation of the Federal Establishment Clause?

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1 Although the *amici* States support both questions Petitioners present, this brief does not address the first question. Rather, it presents an additional, distinct conflict in the lower courts as to the treatment of categorical exclusions of religious schools.

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INTEREST OF *AMICI*

The *amici* States appear as *amici curiae* in support of Petitioners, Kevin and Julia Anderson, *et al.* SUP. CT. R. 37.4.

The *amici* States have a significant interest in this case because of the important religious liberties at stake, most prominently the right of their citizens under the Federal Constitution to be free from governmental discrimination based on religious belief or association. The *amici* States also have a strong interest in a clarification of the law governing their funding programs, in ensuring that each State's citizens are protected from invidious discrimination based on religious beliefs, and in promoting a pluralistic society.

SUMMARY OF ARGUMENT

Maine's tuitioning statute discriminates on the basis of religion. It provides a generally applicable benefit to students in districts without public high schools by paying tuition to the private high school of the parents' choice—so long as that school is not religious.[2] That discrimination is wrong, and it is unconstitutional under the principle that government must be neutral toward religion. The Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), did not grant States an open invitation to exclude religion from all generally applicable government benefits, and the Maine Supreme Judicial Court's forgiving treatment of categorical exclusions of religion from such benefits conflicts with the approach of both the Eighth and Sixth Circuits.

The decision below creates substantial confusion as to the extent to which the Constitution protects religious believers and institutions from discrimination. Under the Maine court's approach, categorical exclusions of religion are subject only to rational basis review, rather than strict scrutiny as under the Eighth and Sixth Circuits'. And, even more importantly, the Maine court's approach is fundamentally contrary to decades of this Court's decisions protecting religious liberty.

Regardless of how this case is analyzed, the Maine program violates the constitutional neutrality principle. And that principle flows, not from just one line of cases or another or one particular clause or another, but

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2 Maine's program covers both elementary and secondary education, but only high school education is at issue here.

from the Free Exercise Clause *and* the Establishment Clause *and* the Free Speech Clause *and* the Equal Protection Clause. All four clauses converge to yield a single principle, and that principle controls this case: In administering a generally applicable program, government must maintain neutrality toward religion. It cannot discriminate in favor of religion, or in favor of one religion over another, and—critically—it cannot discriminate against religion.

ARGUMENT

I. *ANDERSON V. TOWN OF DURHAM*'S CONSTITUTIONAL BLESSING ON A CATEGORICAL EXCLUSION OF RELIGIOUS SCHOOLS FROM A PUBLIC FUNDING PROGRAM CONFLICTS WITH THE APPROACH OF BOTH THE EIGHTH AND SIXTH CIRCUITS.

The opinion below holds that the Free Exercise Clause and the Equal Protection Clause allow the categorical exclusion of religious high schools from a generally available, otherwise neutral state-sponsored tuition program. *See Anderson v. Town of Durham,* 895 A.2d 944 (Me. 2006). Parents in Maine's school districts without a public high school may receive free education at any private school of their choice, so long as that school is not religious. *See* 20-A M.R.S. §2951(2) (2005) ("A private school may be approved for the receipt of public funds for tuition purposes only if it: . . . (2) . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution."). The Maine Supreme Judicial Court held that excluding religious schools *qua* religious schools did not violate the First or Fourteenth Amendments on the ground that even if providing aid would be permissible under the Establishment Clause, the Free Exercise and Equal Protection Clauses did not require it. 895 A.2d, at 961.

A. *Locke v. Davey* Does Not Control.

The Maine Supreme Judicial Court relied heavily on *Locke v. Davey,* 540 U.S. 712 (2004), in which this Court declined to find "presumptively unconstitutional" Washington's otherwise-neutral college scholarship program that excluded devotional theology majors. *Id.*, at 720. *Locke*'s reasoning is narrow and should not be extended beyond its facts. Indeed, the Chief Justice's opinion for the Court deliberately eschewed speaking any more broadly than to the specific circumstance of the ecclesiastical

training of clergy. Thus, the 7-2 majority in *Locke* did not articulate any precise standard for evaluating the defunded scholarship recipient's free-exercise claim. Instead, it described what the program did not do: It found that refusing to fund the training of ministers did not impose sanctions on a religious rite, did not deprive ministers of the opportunity to participate in political affairs, and did not require religious adherents to choose between a belief and a government benefit. *Id.*, at 720-21. These factors cited by the *Locke* majority were not an exclusive list of burdens necessary to win a free-exercise challenge. Rather, they bolstered the creation of a special exception for ministerial training. *Id.*, at 721 ("Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit."). Ministerial training has "no counterpart with respect to other callings or professions." *Id.* Thus, the *Locke* Court's finding that treating ministerial training differently was "not evidence of hostility toward religion," *id.*, did not command the Maine Court's conclusion that "a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes state funding of a religious educational choice." *Anderson*, 895 F.2d, at 959.

Moreover, the *Locke* Court found significant that Washington's scholarship program went "a long way toward including religion in its benefits." *Id.*, at 724. Students receiving the scholarships could "attend pervasively religious schools, so long as they are accredited." *Id.* These students could also take devotional theology courses. *See id.*, at 725. The exclusion of devotional theology majors, therefore, was narrowly tailored to avoid funding sectarian clergy.

Most significantly, the Court found no "animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction *alone* is inherently constitutionally suspect." *Id.* (emphasis added). The lack of animus combined with Washington's long history of refusing to fund clergy were both critical to the Court's conclusion that Washington's Promise Scholarship was constitutional.

By contrast, Maine's section 2951(2) excludes *all* sectarian schools. *Locke's* finding that declining to fund the ecclesiastical training of ministers is constitutionally permissible does not absolve Maine of its constitutional duty to include religious schools in a much broader and

otherwise neutral funding program. The Eighth and Sixth Circuits have found that such categorical exclusions are evidence of hostility toward religion and, as such, warrant strict scrutiny. *See infra*, I.B. The Maine Supreme Judicial Court also assumed pre-*Locke* that strict scrutiny would apply to the exclusion, but then wrongfully read the Court's decision in *Locke* so broadly as to alleviate all free-exercise concerns in educational funding, thus yielding a rational basis analysis. *See Anderson*, 895 A.2d, at 959.

Additionally, Maine, unlike Washington, has no history of refusing to fund religious education, either in public or private schools. Maine has no State constitutional provision equivalent to Washington's, which required public schools to be "free from sectarian control." WASH. CONST. art. IX, §4. To the contrary, Maine's private school tuitioning system for districts without a public school has existed for over 200 years and included religious secondary schools for over a century, from 1879 until 1980 when Maine's attorney general opined that the use of state tuition funds at religious schools violated the Establishment Clause. AVA HARRIET CHADBOURNE, HISTORY OF EDUCATION IN MAINE 281-84 (1936); *see also Anderson*, 895 A.2d, at 948 (citing Op. Me. Att'y Gen. 80-2). Maine's history gives it no basis to apply *Locke*'s ministerial-training exception to its tuition funding.

Finally, the financial burden is substantially higher on would-be tuition recipients than in *Locke*.[3] The *Locke* Court found that Davey suffered only a "relatively minor burden" through the loss of his scholarship. *Locke*, 540 U.S., at 725. Davey's scholarship was worth approximately $3000, *see id.*, at 716, but the value of the lost tuition in Maine is around $20,000. Pet'r Br., at 23. *Locke* found a "minor burden" in part because Davey could use his "scholarship to pursue a secular degree at a different institution from where [he was] studying devotional theology." *Id.*, at 721 n.4. Maine's students do not have Davey's option of using their public funding at one secular institution

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3 *Locke* left unclear whether challengers of a law that is not facially neutral must establish a substantial burden to succeed on a free exercise claim. Rather, it adduced evidence that suggested the law was not "presumptively unconstitutional" in that case. *See* 540 U.S., at 720-21.

while still receiving a religious education at another. Eligible families must choose to forego a religious education or forego the tuition funding. Indeed, Maine has well exceeded *Locke*'s permission to "cho[ose] not to fund a distinct category of instruction," 540 U.S., at 721; it has refused to fund all education taught from a particular perspective. And, because the tuitioning program is provided in districts *without public schools*, parents and students of faith face the stark decision of either giving up all public support for their educational costs or abandoning their ability to receive that education at a school that happens to reflect their religious faith.

Any other private school will be paid for by the State, just so long as that school does not make the disfavored choice of having some religious aspect. *Locke* simply does not stand for the proposition that any and all exclusions of religious schools from state funding is constitutional. This Court should grant the petition to clarify *Locke*'s scope.

B. The Eighth and Sixth Circuits Have Found That Categorical Exclusions of Religion from Government Programs Warrant Strict Scrutiny and Violate the Constitution.

1. *Peter v. Wedl* indicates that a categorical exclusion of religious schools from government funding that includes nonreligious private schools is unconstitutional.

Although the Maine Supreme Judicial Court blessed categorical discrimination against religious schools, the Eighth Circuit reached the opposite conclusion on similar facts. In *Peter v. Wedl*, 155 F.3d 992 (CA8 1998), a Minnesota law allowed funding for paraprofessionals to assist disabled children in the classroom so long as those children did not attend religious schools. *Id.*, at 995-96. The law "explicitly discriminated against children who attended private religious schools," *id.*, at 996, for the identical purpose on which the Maine law relied—avoiding a violation of the Establishment Clause. *Id.*, at 997 ("The only compelling interest identified by the State of Minnesota to justify Minnesota Rule 3525.1150 was that the rule was necessary to avoid a violation of the Establishment Clause."). In *Peter*, as in *Anderson*, subsequent decisions by this Court—*Agostini v. Felton*, 521

U.S. 203 (1997), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), respectively—clarified that funding the religious schools in each of these cases would likely be permissible under the Establishment Clause. *Peter*, 155 F.3d, at 997 (noting that the Establishment Clause rationale was "highly questionable"); *Anderson*, 895 A.2d, at 955 ("[A]fter *Zelman*, public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause . . . ."). The Eighth Circuit in *Peter* then determined that because the Minnesota rule "cannot be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause, it violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection . . . ." 155 F.3d, at 997.

Although Minnesota eliminated its official exclusion of religious schools from its program of funding paraprofessionals, one school district continued the practice. *See id.* The Eighth Circuit reversed the district court's grant of summary judgment for the school district and remanded the case for a determination of whether religious animus motivated the exclusion. *See id.*, at 998-1002. Significantly, it noted: "If [the school district] denied a paraprofessional . . . because of Minnesota Rule 325.1150's unconstitutional distinction between private religious schools and private nonreligious schools, or otherwise because of the religious nature of [plaintiff's school], then [the school district's] action is illegal and the plaintiffs are entitled to the relief that they seek." *Id.*, at 997. Thus, central to the Eighth Circuit's resolution of the appeal was the conclusion that a categorical exclusion of religion *qua* religion from a funding program was per se hostile to religion and would violate the Free Exercise and Equal Protection Clauses.

The Maine court, by contrast, found that "the fact that . . . the Legislature could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause does not support a presumption that religious hostility motivates the decision to continue the religious school exclusion." 895 A.2d, at 959. The *Anderson* court then applied rational basis scrutiny to the challenged statute. *Id.* *Peter*, however, began with the proposition that the categorical exclusion targeted religion and applied strict scrutiny. *See Peter*, 155 F.3d, at 996. Then, after the compelling interest in avoiding an Establishment Clause

violation was disproven in light of this Court's more recent pronouncements, *Peter* affirmed that the law violated the First and Fourteenth Amendments. *Id.*, at 997. *Anderson* and *Peter* thus directly conflict as to the level of scrutiny that applies when a State categorically excludes religion from a funding program.

2. The Sixth Circuit has held that categorically banning religious practices from an army-regulated family child-care provider program failed strict scrutiny analysis.

The Sixth Circuit addressed an Army regulation's categorical ban on religiously oriented child-care in *Hartmann v. Stone*, 68 F.3d 973 (CA6 1995). There, Army regulations governing the provision of child care on base—at the parents' expense—barred approved providers from engaging in religious exercises with or otherwise proselytizing the children. *Id.*, at 975-77. The Sixth Circuit found initially that "[a] rule that uniformly bans all religious practice is not neutral." *Id.*, at 978 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion, *or of religion in general.*") (emphasis added)). Because the Sixth Circuit found that the categorical exclusion of religion deprived the law of neutrality, it applied strict scrutiny using the standard articulated in *Lukumi*: "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.*, at 979 (quoting *Lukumi*, 508 U.S. at 533). Indeed, the *Hartmann* court found that if the law was not neutral, the plaintiffs need not demonstrate a substantial burden on their religious exercise—the categorical religious exclusion itself sufficed to trigger strict scrutiny. *Id.*, at 979 n.4. The court concluded that the army's program violated the First Amendment. *Id.*, at 986. Thus, *Hartmann* also conflicts with *Anderson* both in finding that a categorical ban on religious exercises warrants strict scrutiny and in not requiring the plaintiffs to demonstrate a substantial burden for that test to apply.

II. THE CONSTITUTION MANDATES NEUTRALITY TOWARD RELIGION THROUGH THE ESTABLISHMENT CLAUSE, THE FREE EXERCISE CLAUSE, THE EQUAL PROTECTION CLAUSE, AND THE FREE SPEECH CLAUSE.

Maine's categorical exclusion of religious schools from an otherwise neutral, generally applicable funding program unconstitutionally discriminates against religion. Regardless of the clausal lens through which the program is viewed, this discrimination violates the bedrock principle underlying the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.[4] That principle—neutrality—demands at minimum that a State not place religious persons or institutions at a substantial disadvantage by excluding them from state-sponsored benefits to which they are otherwise entitled.

Neutrality has long been a fixed and constant star in the Court's jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause.[5] These clauses—and the neutrality

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4 In Maine, "the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive." *Anderson v. Town of Durham*, 895 A.2d 944, 949 n.4 (Me. 2006) (quoting *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 132 (Me. 1999)).

5 The Free Speech Clause's prohibition on viewpoint neutrality reinforces and converges with the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. This Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that public school's exclusion of Christian Bible Club from after-school community-use program based on club's religious nature constituted impermissible viewpoint discrimination); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842-46 (1995) (holding that state university's refusal to fund student group's newspaper expressing Christian editorial viewpoint was viewpoint discrimination, and that funding newspaper as part of general, religion-neutral program funding various student groups did not violate the Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96 (1993) (holding that exclusion of Christian-oriented film series from program allowing various groups to use school premises after hours constituted viewpoint discrimination,

principle uniting them—converge in this case to demonstrate that Maine has impermissibly discriminated against parents' religiously motivated educational choices. Although this Court held in *Locke v. Davey*, *supra*, that the State of Washington could refuse to fund theology majors, Maine's program goes considerably further. *See supra* Part I.A. The Court found significant in *Locke* that the State allowed the neutrally awarded scholarship funds to facilitate both the study of religion from a secular perspective and the study of secular subjects from a religious perspective. *See* 540 U.S., at 724-25. Maine's parents, however, may not use state tuition for education from *any* religious high school. *See* 20-A M.R.S. §2951(2).[6] The Maine statute does not comport with the Constitution.

A. The Religion Clauses Jointly and Severally Compel Neutrality.

This Court has most directly recognized the principle of governmental neutrality toward religion in the First Amendment's Free Exercise and Establishment Clauses. U.S. CONST. amend. I ("Congress

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and rejecting argument that allowing films would violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that state university could not deny student prayer and Bible-study group access to university facilities available to other student groups); *see also Bd. of Regents of Wis. v. Southworth*, 529 U.S. 217, 231 (2000) ("It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her."). This Court held in *Locke v. Davey* that the speech-forum line of cases was "inapplicable" to Washington's Promise Scholarship Program. 540 U.S. 712, 720 n.3 (2004). However, the same bedrock principle on which the forum cases' doctrine of viewpoint neutrality rests also informs the doctrines governing the interpretation of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

6 The statute states that schools receiving "public funds for tuition purposes" must be "nonsectarian." 20-A M.R.S. §2951(2). Although the Maine Court noted that the schools petitioners attend are "pervasively sectarian," *Anderson*, 895 A.2d, at 950 & n.7 (citing *Hunt v. McNair*, 413 U.S. 734, 743 (1973)), the parties in this case have not suggested that Maine's law would allow funds to sponsor tuition at a nominally religious high school. Functionally, "nonsectarian" operates as a categorical exclusion of all religious high schools.

shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."). These clauses jointly ensure religious liberty by mandating that the government can neither "impose special disabilities on the basis of religious views or status," *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990), nor foster "bias or hostility to religion," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995). As one First Amendment scholar has explained, although some perceive tension between the Free Exercise and Establishment Clauses, the two clauses are more appropriately viewed as "but two sides of the same coin" representing "a single value in our constitutional democracy—religious freedom." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986); *see also Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."). Thus, a "proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of neutrality toward religion." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973).

1. The Free Exercise Clause prevents unjustified hostility toward religion.

"The Free Exercise Clause protects religious observers against unequal treatment." *Lukumi*, 508 U.S., at 542 (citation omitted). Laws burdening religious practices must be neutral and of general applicability; otherwise, they must be narrowly tailored to advance "interests of the highest order," a "most rigorous" form of scrutiny that is satisfied "only in rare cases." *Id.*, at 546. The minimum requirement of neutrality is that the law must not be facially discriminatory. *Id.*, at 533. Moreover,

"categories of selection are of paramount concern when a law has the incidental effect of burdening a religious practice." *Id.*, at 542.[7]

In *Lukumi*, the Court unanimously struck down on Free Exercise grounds a group of municipal ordinances that sought to prevent the sacrifice of animals by practicioners of the Santeria religion. After examining those ordinances, the Court concluded that "religious practice [was] being singled out for discriminatory treatment." *Id.*, at 538.

The Court rejected the City of Hialeah's argument that the ordinances were validly aimed at preventing animal cruelty and avoiding health hazards from improper disposal because the City had not attempted to pursue these goals with regard to conduct not motivated by religious belief. *Id.*, at 544-45. Because the ordinances distinguished between identical conduct based solely on religious belief—prohibiting animal slaughter by religious believers but allowing it by secular operators—the Court concluded that they constituted a "religious gerrymander" and struck them down as an impermissible burden on Santeria practicioners' free exercise rights. *Id.*, at 535-38.

The distinctions between this case and *Lukumi* do not remove Maine's law from *Lukumi*'s ambit: (1) In *Lukumi*, the law in question targeted one particular religion—Santeria—while Maine's law targets religion generally; and (2) *Lukumi* made a specific religious exercise illegal while Maine has merely excluded religious institutions from an educational funding scheme, leaving believers to worship or practice as they wish. The key issue is the same: Both laws discriminated against otherwise permissible conduct based on its religious perspective. The City of Hialeah allowed animal slaughter so long as it was not religious; likewise, Maine funds high school instruction so long as it is not

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7 The *Locke* Court noted that "[b]ecause . . . the program is not a violation of the Free Exercise Clause, . . . we apply rational-basis scrutiny to his claims. . . . [T]he program passes such review." 540 U.S., at 721 n.3. The *Locke* opinion thus recognizes the link between the Free Exercise Clause and the Equal Protection Clause. A law that infringes on a fundamental right, such as the right to the free exercise of one's religion, would warrant strict scrutiny. The Equal Protection Clause thus reinforces the neutrality guarantee of the Free Exercise Clause by holding laws that infringe upon it to a higher standard.

religious. Indeed, as the *Lukumi* Court said, "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[8] *Id.*, at 532; *see also McDaniel v. Paty,* 435 U.S. 618, 620, 629 (1978) (plurality op.); *id.*, at 630-31 (Brennan, J., concurring) (invalidating on Free Exercise grounds a Tennessee law discriminating against religion generally by banning ministers or priests "of any denomination whatever" from serving as delegates to state constitutional conventions); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (CA3 1999) (applying strict scrutiny and invalidating on Free Exercise grounds an exemption to a policy requiring police officers to shave that was granted for medical reasons but denied for religious reasons).

Lukumi teaches that the Free Exercise Clause prohibits singling out religious belief or affiliation as the basis for providing different treatment to persons who are otherwise similarly situated. Critical to the constitutional infirmity of the Maine program is the *general applicability* of the tuitioning statute. Maine has decided that every student in a district without a public school deserves a state-sponsored education--except those students who choose to attend religious schools. The State of Maine could have required the establishment of a public school, or decided to subsidize one specific type of speech or area of academic study, but it has not. Once the State creates a generally applicable tuition payment program, it may not discriminate against certain of its citizens solely because they choose to pursue a religious education any more than it could redraw bus routes to avoid religious schools or deny students library cards who would use the books to write devotional essays.

It is no answer to say that because the State could have established a public school that would exclude sectarian beliefs from its curriculum, it may also exclude sectarian schools from its tuition funding program.

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8 Even though "[n]one of the parties asserts that their [*sic*] religious beliefs mandate that they send their children to religious schools," *Anderson*, 895 A.2d, at 950, some parents asserted that they sent their children to religious schools for religious reasons. *See id.*

Certainly Maine is not constitutionally required to establish a public school or to fund any private schools, but once it chooses to provide private school tuition funding in lieu of a public education, it creates a "baseline against which the burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Locke*, 540 U.S., at 726-27 (Scalia, J., dissenting).[9]

This principle is the obverse of the Court's holding in *Smith*, that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S., at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). Just as the Free Exercise Clause does not give license for religious believers to disregard neutral and generally applicable laws, neither does it permit government to exclude religious believers from otherwise generally applicable programs.

Here, Maine's tuition payment statute is not even facially neutral. The statute states that "[a] private school may be approved for the receipt of public funds only if it: . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution : . . ." 20-A M.R.S. §2951(2). Thus, the statute "impos[es] special disabilities on the basis of religious views or status," *Smith*, 494 U.S., at 877, and is not entitled to *Smith*'s rational-basis deference. "Neutrality and general applicability are interrelated . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S., at 531-32.

Indeed, Maine's Supreme Judicial Court recognized pre-*Locke* that the statute should be subjected to strict scrutiny. *Anderson*, 895 A.2d, at 959. Although *Locke* refused to apply strict scrutiny to fund the training

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9 The categorical exclusion of religious schools from the full tuition funding provided for other private schools does not qualify for *Locke*'s narrow exception. *See supra* Part I.A.

of ministers, that case does not stand, as the Maine court suggests, for the proposition "that a statute does not lose its neutrality and become subject to strict scrutiny simply because it precludes the state funding of a religious educational choice." *Anderson*, 895 A.2d, at 959; *see supra* I.A. Rather, *Locke* specifically declined to address the sort of broad-based categorical exclusion of religion Maine has adopted, finding merely that Washington's program was not "presumptively unconstitutional." *Locke*, 540 U.S., at 720.

Maine's statute requires parents and students to abandon either the religious education they desire or the tuition funding Maine would provide if they attended a secular private school. *Cf. McDaniel*, 435 U.S., at 629 (holding a law unconstitutional that required a minister to abandon either his calling or his elected office). Because the Free Exercise Clause prohibits discrimination against religious belief regardless of whether such discrimination constitutes a direct or indirect burden on religious practice, the tuitioning statute is constitutionally invalid.

2. The Establishment Clause commands official neutrality toward religion.

The Establishment Clause both prevents official sponsorship of religion and prevents official discrimination against it. Indeed, the second prong of the classic tripartite test articulated in *Lemon v. Kurtzman* for evaluating Establishment Clause claims requires that a law's "principal or primary effect must be one that neither advances *nor inhibits* religion." 403 U.S. 602, 612 (1971) (emphasis added). If creating an incentive that favors religion would improperly "advance" religion, creating a disincentive would likewise unconstitutionally "inhibit" it. *See Zelman*, 536 U.S., at 648-49 (noting that the Establishment Clause prevents states "from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion") (citation omitted).

The Maine Supreme Judicial Court agreed that the Establishment Clause could permit the State to pay for students' tuition at religious schools. *See Anderson*, 895 A.2d, at 959 (noting that "the Legislature could hypothetically extend tuition funding to sectarian schools without

violating the Establishment Clause"). Maine's tuitioning statute is similar to that approved in *Zelman* in all legally relevant aspects. Opening Br. of Plaintiffs-Appellants, at 11. So long as a government program is neutral—between and among different religions, and between religion and nonreligion—the fact that, through the exercise of individual choice on the part of the recipient, government money ultimately goes to religious ends does not render the government program invalid.

The Court's Establishment Clause jurisprudence reflects a requirement of neutrality toward religion that exists in harmony with the neutrality commanded by the Free Exercise Clause. And a long line of this Court's cases make clear that neutrality both satisfies and is required by the Establishment Clause. *See Zelman,* 536 U.S., at 653-54 (holding that the state's school-voucher program did not violate the Establishment Clause because it was "neutral in all respects toward religion," accomplished a secular purpose of providing educational assistance to a broad class of persons without regard to religion, and contained no financial incentives favoring religious schools over non-religious ones); *Mitchell v. Helms*, 530 U.S. 793, 808-11 (2000) (plurality op.) (upholding State's load of non-religious educational materials to religious schools because aid had valid secular purpose and was offered on religion-neutral basis to all schools); *Agostini*, 521 U.S., at 234-35 (holding that provision of remedial instruction by government employees at sectarian schools did not violate Establishment Clause when provided to disadvantaged children on neutral basis pursuant to program containing safeguards preventing state-sponsored religious indoctrination).

Indeed, "the Establishment Clause forbids the government to use religion as a line-drawing criteria. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

Line-drawing is essentially coercive, and the principle of coercion also links the Establishment Clause and the Free Exercise Clause. The Establishment Clause prevents the intentional coercion of nonadherents

into a public religious exercise. *See Lee v. Weisman,* 505 U.S. 577 (1992) (holding a graduation prayer unconstitutional). Likewise, the Free Exercise Clause prohibits the targeted coercion of adherents into not practicing the tenets of their faith, *see Lukumi,* 508 U.S., at 533, or the coercive choice between a religious calling and a government benefit. *See McDaniel,* 435 U.S., at 629. Maine's tuitioning statute is particularly coercive in that it deprives parents of an entire category of educational choices unless they can afford to pay for it themselves. Indeed, for precisely this reason, John Bapst Catholic High School was forced to close when Maine excluded religious schools from tuition funding. *See* Pet'r Br., at 5.

Once the government makes available a public benefit, categorically excluding religion from that benefit is unconstitutional under either Establishment or Free Exercise analysis.

B. The Equal Protection Clause Protects Religion from Categorical Exclusion.

The neutrality required under the Free Exercise and Establishment Clauses is closely related to the neutrality principles undergirding the Equal Protection Clause. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, *religious,* sexual, or national class." *Miller v. Johnson,* 515 U.S. 900, 911 (1995) (emphasis added) (quoting *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting), and *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073, 1083 (1983)).

The anti-discrimination principle enshrined in the Religion Clauses is consonant with the Court's recognition that classifications based on religion warrant strict scrutiny because the Equal Protection Clause forbids discrimination on the basis of a person's religious belief. *See Smith,* 494 U.S., at 886 n.3; *Burlington N. R.R. Co. v. Ford,* 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam).

This Court also has long recognized that equal protection principles apply at the convergence of free-speech and free-exercise rights. *See*

Niemotko v. Maryland, 340 U.S. 268, 272 (1951) ("The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."); *id.*, at 284 (Frankfurter, J., concurring in the result) ("To allow expression of religious views by some and deny the same privilege to others merely because they are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."). For example, in *Police Department of Chicago v. Mosley*, the Court struck down a statute exempting peaceful labor picketing from a general prohibition on picketing next to a school, concluding that the need for content neutrality in a state's "time, place, and manner" regulations of speech involved an equal protection claim closely intertwined with First Amendment interests: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny its use to those wishing to express less favored or more controversial views . . . There is an 'equality of status in the field of ideas.'" 408 U.S. 92, 95-96 (1972).

The Equal Protection Clause's principle of neutrality toward religion also undergirds the forum cases decided in the Free Speech context. Indeed, this Court has repeatedly held that the Free Speech Clause forbids the exclusion of speakers or groups from a public forum or limited public forum because of their religious messages. *See supra* n.4. The forum cases, in turn reflect the neutrality principle underlying and emanating from the Equal Protection and Free Exercise inquiries.

The Free Speech Clause does not allow a State distributing a generally available benefit to engage in viewpoint discrimination. That clause requires "the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content." *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). This scrutiny applied to restrictions on religious speech tracks that applied to other types of religious discrimination. This Court has recognized that complying with the Establishment Clause may be a compelling interest to satisfy that scrutiny. *Id.*, at 271. It held in *Rosenberger*, however, that if funding of religious speech would not violate the Establishment Clause, fear of such violation would not excuse unconstitutional viewpoint discrimination. 515 U.S., at 845-46.

That commitment to neutrality informs the Free Exercise and Equal Protection analysis here. The Maine Supreme Judicial Court rightly observed (then wrongly applied) the rule that if the Establishment Clause did not require the exclusion of religious schools, then §2951(2) "must be struck down because the State offers no other reason for its existence." *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 138 (Me. 1999). Once the Establishment Clause bar is removed, the categorical exclusion of religious schools under a facially discriminatory law cannot survive strict scrutiny under either the Free Exercise or Equal Protection analyses. Indeed, this Court has gone even further, indicating that a broad categorical exclusion of a particular group from rights other citizens enjoyed "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

It is therefore unsurprising that the Court has looked repeatedly to its equal protection jurisprudence in assessing neutrality for purposes of both Free Exercise and Establishment Clause analysis. *See Lukumi*, 508 U.S., at 540 (applying equal protection principles to Free Exercise analysis) (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970) (opining that the Establishment Clause "*requires an equal protection mode of analysis*. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") (Harlan, J., concurring) (emphasis added)); *see also Lukumi*, 508 U.S., at 578 (Blackmun, J., concurring) (describing the *Smith* Court as "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle").[10] Accordingly, the Equal Protection

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10 First Amendment scholars have applauded the equal-protection aspect of the Court's treatment of the Religion Clauses. *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999); Paulsen, *supra*, at 325 ("[T]he establishment clause is best understood as providing for the equal protection of the free exercise of religion."). That equal protection component can be recognized for its independent force or characterized as an aspect of incorporation, focusing like a lens the contours of the Religion Clauses. *See Recent Development: Animal Sacrifice and Equal Protection Free Exercise*, 17 HARV. J. L. & PUB. POL'Y 262 (1994); *cf.* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131,

Clause serves as yet another source of the neutrality principle that forbids governmental discrimination against religious belief.

As this Court has stated, the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S., at 839. Requiring Maine to cease excluding religious schools from its tuitioning funding program will promote that diversity, respect the constitutional norm of neutrality, and prevent unconstitutional discrimination on the basis of religion.

III. SHOULD THE COURT WISH TO DECIDE THIS IMPORTANT QUESTION, THE INSTANT CASE WOULD PROVIDE AN APPROPRIATE VEHICLE TO STRIKE A CATEGORICAL EXCLUSION OF RELIGION.

In *Locke*'s wake, there is a substantial need for the Court to clarify the standard of scrutiny applicable to a categorical exclusion of religion from a government benefit and whether such exclusion indicates hostility toward religion. This case would be a suitable vehicle for that purpose. First, the facts are not in dispute. *Anderson*, 895 A.2d, at 949. Second, the First and Fourteenth Amendment rights under the federal Constitution are coextensive with the parallel rights under Maine's constitution. *Id.*, at 949 n.4. Finally, Maine has no Blaine Amendment and no historical tradition of refusing to fund religious schools that would distinguish its laws from the Court's interpretation of the federal Constitution. Thus, the issue of whether a categorical exclusion of religion from a generally available public benefit is squarely presented.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Maine Supreme Judicial Court.

1136-37 & n.23 (1991).

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